89-679

No. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DANIEL BELL, *et al.*

Petitioners,

v.

RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether mandatory urinalysis drug testing of federal government employees on a random basis is violative of the fourth amendment to the United States Constitution.

2. Whether the categorical approach taken by the court below to allow such testing of all employees holding top secret clearances is inconsistent with this Court's guidance in *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989).

THE PARTIES

Plaintiffs below and petitioners herein are Daniel Bell, Tressa Borland, Norajean Flanagan, Nelson Hermilla, Barry Kowalski, Greg Linsin, Leo Neshkes, Fred Wagner, Beneva Weintraub, and Paula Wolff.

Plaintiffs below, who do not hold top secret security clearances and, therefore, are not petitioners herein, are Mark B. Harmon, Cynthia Alford, Jo Brooks, Daniel Butler, David D. Buvinger, Kevin Callahan, Patricia G. Chick, Rebecca P. Dick, Karla Dobinski, Michael J. Gennaco, Albert S. Glenn, Elaine M. Gordon, Irv Gornstein, Lorna Grenadier, Bradley D. Jackson, Lisa Kahn, Christopher J. Kelly, Diane R. Kilbourne, Louise A. Lerner, Peter W. McCloskey, Marie K. Mcelderry, Mary Jean Moltenbrey, Eric W. Nagle, Kathleen B. Nalty, David Orbuch, Criselda Ortiz, John R. Sawyer, Deborah Sines, Isabelle M. Thabault, Litida F. Thome, and William R. Yeomans.

Plaintiffs below who hold top secret security clearances and are not petitioners herein are Chuck Schwidde and Lisa Kahn.

Defendants below and respondents herein are Richard L. Thornburgh, Attorney General of the United States, and Harry H. Flickinger, Assistant Attorney General for Administration.

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OPINIONS BELOW

The opinion of the district court is reported at 690 F. Supp. 65 (D.D.C. 1988) (Appendix at 38, hereinafter referred to as "A-___"), and the opinion of the court of appeals is reported at 878 F.2d 484 (D.C. Cir. 1989) (A-3).

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1989. On September 1, 1989, respondent's petition for rehearing and suggestion for rehearing *en banc* were denied (A-1, A-2). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 2101(c).[1]

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves Executive Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 17, 1986); Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed.

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[1] Petitioners are required to file for a writ of certiorari at this early date to ensure that the government does not begin random drug testing and irreversibly alter the *status quo* as a result of the court of appeals mandate scheduled to issue on October 10, 1989. The government will be required to file a petition for writ of certiorari by November 30, 1989 regarding the issues upon which petitioners prevailed. Petitioners have not been informed whether the government will seek review of those issues by this Court.

Reg. 11,970 (Apr. 11, 1988); the Department of Justice Drug-Free Workplace Plan (as amended Dec. 17, 1987); and the Department of Justice Drug-Free Workplace Program for the Offices, Boards and Divisions, OBD 1792.1 Order (June 27, 1988). The foregoing documents are set out *verbatim* in the Appendix.

STATEMENT OF THE CASE

The controversy in this case is whether mandatory drug testing by urinalysis of federal employees on a random basis is constitutional under the fourth amendment to the United States Constitution. Specifically, this case centers on employees in the Offices, Boards and Litigating Divisions of the Department of Justice ("DOJ") who have been issued top secret clearances. The drug testing program in question is conducted pursuant to the Department of Justice Drug-Free Workplace Plan ("DOJ Plan," A-70) issued on September 25, 1987 (as amended December 17, 1987), which is applicable throughout the DOJ, and the Department of Justice Drug-Free Workplace Program for the Offices, Boards and Divisions ("OBD Plan," A-105), OBD 1972.1, issued June 27, 1988.[2] On June 27, 1988, the DOJ notified its employees that mandatory urinalysis drug testing on a random basis (often referred to as "random drug testing") could begin as soon as 60 days thereafter, and announced that 1,800 of the employees so notified had been designated for testing. The DOJ and OBD Plans were formulated pursuant to

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[2] The OBD Plan will test for marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP). OBD Plan at A-112.

Executive Order No. ("E.O.") 12,564 (A-61)[3] which was issued by President Reagan on September 15, 1986. Under E.O. 12,564, the head of every federal agency is required to formulate a drug testing plan with mandatory random or otherwise uniform testing of all employees in "sensitive positions."[4] On May 3, 1988, the Administration informed Congress that 345,528 federal employees had been designated for random testing pursuant to E.O. 12,564 and the respective agencies' plans.[5]

Petitioners in this case are 10 DOJ attorneys who have been designated for random testing under the DOJ and

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[3] 51 Fed. Reg. 32,889 (1986). The catalyst for E.O. 12,564 was the report of the President's Commission on Organized Crime, which urged the use of "suitable drug testing programs" in all federal agencies to "express the utter unacceptability of drug abuse" in society and to serve as a model for programs by state and local governments and the private sector. *See* President's Commission on Organized Crime, "America's Habit: Drug Abuse, Drug Trafficking and Organized Crime," U.S. Govt. Printing Office (1986), p. 483.

[4] The Order specifies several types of sensitive positions and also defines such positions as any "that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or a high degree of trust and confidence." E.O. 12,564 § 7(d)(5). In addition, the Executive Order authorizes agency heads to test any applicant for employment for illegal drug use, regardless of the nature of the position sought.

[5] Havemann, "U.S. Details Plans For Drug Tests," Washington Post, May 4, 1988, at A1.

OBD Plans because, among other things, they hold top secret clearances. Originally, petitioners, as well as 30 other DOJ employees (attorneys, paralegals and an economist who were designated for testing under the OBD Plan on other grounds) brought suit on June 28, 1988 in the United States District Court for the District of Columbia to challenge the legality of the DOJ and OBD Plans under the fourth amendment, as well as other constitutional provisions and statutes not at issue in this petition.

Plaintiffs in the district court moved promptly for a preliminary injunction, and defendants moved for summary judgment on plaintiffs' fourth amendment claims. On July 28, 1989, the district court heard both plaintiffs' and defendants' motions. On July 29, 1988, the district court issued a preliminary injunction enjoining the DOJ "from implementing mandatory random drug testing by urinalysis in the Offices, Boards and Litigating Divisions of the Department of Justice." *Harmon v. Meese*, 690 F. Supp. 65, 70 (D.D.C. 1988), *aff'd in part and remanded*, *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (A-50). On the same day, the district court refused defendants' request to stay the injunction (A-54), and, on the defendants' unopposed motion, made its injunction permanent (A-52). The defendants appealed to the United States Court of Appeals for the District of Columbia Circuit on August 5, 1988 (A--56).

The case was argued in the court of appeals on December 15, 1988. The day after oral argument, the court of appeals ordered that the injunction be modified to permit

random testing of DOJ employees who held Presidential appointments or were responsible for maintaining, storing or safeguarding controlled substances, *Harmon*, 878 F.2d at 487 (A-8), because plaintiffs lacked standing to represent these employees. The controversy before the court of appeals was thereby limited to the constitutionality of DOJ's random drug testing plan for federal prosecutors, employees with access to grand jury proceedings, and employees holding top secret national security clearances. *Id.*

In its decision on the merits, the court of appeals, guided by two recent Supreme Court decisions involving mandatory *non-random* drug testing issued after the district court's injunction -- *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), and *Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402 (1989) -- held that the injunction should be modified to permit the random testing of employees with top secret clearances. The court of appeals upheld the remainder of the district court's injunction regarding prosecutors in criminal cases and employees with access to grand jury proceedings. *Harmon*, 878 F.2d at 485 (A-4). The defendants sought rehearing *en banc*, which was denied on September 1, 1989 (A-1).

In reaching its decision, the court of appeals evaluated the three relevant governmental interests identified by this Court in *Von Raab* and *Skinner* -- *i.e.*, maintaining the integrity of its employees, enhancing public safety, and protecting truly sensitive information -- "which might, in

appropriate circumstances, be sufficiently compelling to justify mandatory testing even in the absence of individualized suspicion." *Harmon*, 878 F.2d at 488 (A-9). The court of appeals found that the integrity and public safety interests were not compelling in the context of the OBD Plan. *Id.* at 490-91 (A-13-16). With regard to protecting truly sensitive information, however, the court of appeals read this Court's statement in *Von Raab* that "employees who seek promotions to positions where they would handle sensitive information can be required to submit to [drug testing]," *Von Raab*, 109 S. Ct. at 1397, to apply with equal force to random drug testing of all employees who already hold top secret security clearances, irrespective of the degree to which these employees actually handle sensitive information. The court of appeals concluded that, while *Von Raab* did not define the precise contours of "truly sensitive" information, it encompassed top secret national security information; therefore, the government could "properly make [random drug] testing a requirement for holding a top secret security clearance." *Harmon*, 878 F.2d at 492 (A-18).

The court of appeals remanded the case to the district court with instructions to modify its current injunction to allow testing of DOJ employees with top secret clearances. As noted, the court affirmed the balance of the injunction. *Id.* at 493-95 (A-19-27).

REASONS FOR GRANTING THE WRIT

This petition presents an issue of national importance, which will have a direct impact on hundreds of thousands

of federal employees. It involves the unreasonable imposition of mandatory random drug testing on federal employees without any individualized suspicion. In addition, this case will have a direct impact on a large number of state and local government employees who are, or may be, subject to random drug testing plans and entitled to fourth amendment protection.

I. This Case Provides The Court With The Opportunity To Determine Whether Mandatory Urinalysis Drug Testing Of Federal Employees On a Random Basis Is Constitutional.

In *Von Raab* and *Skinner*, this Court approved limited mandatory drug testing programs that were not issued pursuant to E.O. 12,654 and did not involve random testing. Specifically, *Von Raab* involved the testing of Customs agents who were "directly involved in the interdiction" of illegal drugs and/or who were "required to carry firearms" (109 S. Ct. at 1394); *Skinner* applied to train crews involved in accidents and railroad employees who violated certain safety rules. As such, those cases involved only "gateway" testing, where specific conditions or acts triggered testing.

This case presents the Court with the opportunity to consider whether the principles of *Von Raab* and *Skinner* can properly be extended to random testing, *i.e.*, testing that occurs on short notice and without any triggering act taken by the incumbent employee. The differences between random and gateway testing are profound. For

example, the Customs agents in *Von Raab* could forego testing simply by declining to seek promotions or transfers to test-designated positions. Here, because of post-hoc test-designation of their positions, DOJ employees are subject to random drug testing, at the risk of losing their jobs if they refuse. In addition, random drug testing under the DOJ and OBD Plans applies on a much broader scale than the narrowly-tailored testing approved in *Von Raab* and *Skinner*; it puts all designated employees at risk of random testing, regardless of their performance, the honors or awards they may have won, or their length of service.

The broad scope of the federal government's ubiquitous random drug testing efforts under E.O. 12,654 have produced numerous court challenges, with widely inconsistent results. For example, while some courts have approved random testing on public safety or law enforcement grounds, others have held random screening to be unreasonable under the fourth amendment. *Compare National Fed'n of Fed. Employees v. Cheney*, Nos. 88-5080, *et al.*, slip op. (D.C. Cir. Aug. 29, 1989) (1989 U.S. App. LEXIS 12963) (after *Von Raab*, random testing of civilian police and guards employed by the United States Army upheld) *with American Fed'n of Gov't Employees v. Thornburgh*, 713 F. Supp. 359 (N.D. Cal. 1989) (random testing of border patrol employees enjoined as

unreasonable under the fourth amendment).[6] Unless this Court addresses the constitutionality of random testing of federal workers, this confusion will only be multipled, both because many federal agencies have yet to announce their drug testing programs, and the *Von Raab* and *Skinner* decisions offer no bright-line test for the lower courts to apply. Indeed, the court below acknowledged this difficulty. *Harmon,* 878 F.2d at 488-89. Thus, this issue, affecting the privacy rights of hundreds of thousands of federal workers, is one on which this Court's guidance is sorely needed.

II. The Decision Of The Court Below Improperly Extends The Results In Skinner And Von Raab To Random Testing.

In its partial approval of the DOJ random testing scheme, the court below claimed to be "guided -- and, to a large extent, controlled" by its reading of the general principles of *Skinner* and *Von Raab*. *Harmon*, 878 F.2d at 487 (A-8). Yet, as noted, those cases did not involve

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[6] A motion to vacate the injunction in that case in light of *Von Raab* and *Skinner* was denied, *American Fed'n of Gov't Employees v. Thornburgh*, No. C-88-20729-WAI (N.D. Cal. Sept. 5, 1989).

Other pre- and post-*Von Raab* cases addressing federal random testing programs with widely varying results include: *Thomson v. Marsh*, 878 F.2d 1431 (4th Cir. 1989); *Quadros v. Reagan*, No. C-88-1764-RHS (N.D. Cal.), *appeal dismissed*, No. 89-15122 (9th Cir.

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random testing. The broad application of *Skinner* and *Von Raab* to the DOJ Plan in fact violates a central principle of those cases: that searches must be grounded on individualized suspicion except in "limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy ...."

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May 24, 1989); *American Fed'n of Gov't Employees v. Meese*, 668 F. Supp. 547 (N.D. Cal. 1988), *appeal dismissed*, No. 88-2841 (9th Cir. Apr. 4, 1989); *American Fed'n of Gov't Employees v. Skinner*, No. 87-5417, *slip op.* (D.C. Cir. Sept. 8, 1989); *Transportation Institute v. United States Coast Guard*, No. 88-3429 (D.D.C. Aug. 3, 1989) (1989 U.S. Dist. LEXIS 9287); *American Fed'n of Gov't Employees v. Cavazos*, No. 89-0775 (D.D.C. July 26, 1989) (1989 U.S. Dist. LEXIS 8656); *National Treasury Employees Union v. Watkins*, No. 89-1006 (D.D.C. June 16, 1989); *Connelly v. Horner*, No. C-88-5085-DLJ (N.D. Cal. June 15, 1989); *Hartness v. Bush*, 712 F. Supp. 986 (D.D.C. 1989); *National Fed'n of Fed. Employees v. Lyng*, No. 88-3505 (D.D.C. Mar. 28, 1989); *Bangert v. Hodel*, 705 F. Supp. 643 (D.D.C. 1989); *Owner-Operators Indep. Drivers Ass'n, Inc. v. Burnley*, 705 F. Supp. 481 (N.D. Cal. 1989); *National Fed'n of Fed. Employees v. Cheney*, No. 89-1727 (D.D.C. filed June 16, 1989); *Marine Engineers Beneficial Ass'n, District 2 v. Yost*, No. 89-1519 (D.D.C. filed May 24, 1989); *Goddard Engineers, Scientists & Technicians Ass'n v. National Aeronautics & Space Admin.*, No. 89-0922 (D.D.C. filed Apr. 4, 1989); *Braithwaite v. Carlucci*, No. 88-2308 (D.D.C. Dec. 21, 1988); *National Treasury Employees Union v. Lyng*, 706 F. Supp. 934 (D.D.C. 1988); *Hansen v. Turnage*, No. C-88-30261

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Skinner, 109 S. Ct. at 1417. The DOJ Plan, a typical agency random testing program, does not meet that test. By hearing this case, this Court will be able to assess and prevent such an unfortunate extension of *Skinner* and *Von Raab* to random testing.

Both *Skinner* and *Von Raab* turned on limited circumstances not present in *Harmon*. In *Skinner*, the government's public safety interest in the operation of the nation's railroads, coupled with a documented relationship between train accidents and drug and alcohol abuse, was held to justify urinalysis drug testing of train crews involved in accidents and of employees who violated certain safety rules. The evidence produced in *Skinner* indicated that, during the period 1975-1986, 45 train accidents (some involving the release of hazardous materials) occurred due to the actions of drug- or alcohol-impaired employees, resulting in 34 fatalities, 66 injuries and over $28 million in

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RFA (N.D. Cal. July 28, 1988); *National Air Traffic Controllers Ass'n v. Burnley*, 700 F. Supp. 1043 (N.D. Cal. 1988); *National Treasury Employees Union v. Reagan*, 685 F. Supp. 1346 (E.D. La. 1988); *Amalgamated Transit Union v. Burnley*, No. 88-3642 (D.D.C. filed Dec. 23, 1988) (consolidated with Nos. 89-0067 and 89-1067); *National Fed'n of Fed. Employees v. Hodel*, No. 88-3518 (D.D.C. filed Dec. 12, 1988); *American Fed'n of Gov't Employees v. Bowen*, No. 88-3594 (D.D.C. filed Dec. 16, 1988); *Missiaen v. Lyng*, No. 88-3264 (D.D.C. filed Nov. 10, 1988); *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986).

property damage. 109 S. Ct. at 1408. Twenty-three percent of all operating employees were problem drinkers, and thirteen percent admitted to having reported to work drunk. *Id.* at 1407 n.1. All employees to be tested were engaged in safety-sensitive tasks. *Id.* at 1414. Since such employees "can cause great human loss before any signs of impairment become noticeable" (*id.* at 1419), and because the chaos of a train accident makes on-site assessment of individual impairment impracticable (*id.* at 1420), this Court upheld testing of train crews involved in major accidents.

In *Von Raab*, the Court found the government's asserted integrity interest compelling because it was directly related to drug testing of front-line drug interdiction personnel for the purpose of ensuring that they were "physically fit" and had "unimpeachable integrity." 109 S. Ct. at 1393. The Court described the Customs Service as "the first line of defense against one of the greatest problems affecting the health and welfare of our population." *Id.* at 1392. Customs employees have "[i]n the routine discharge of their duties ... direct contact with those who traffic in drugs for profit" (*id.* at 1387) and who "do not hesitate to use violence to protect their lucrative trade and avoid apprehension." *Id.* at 1392. As a result, Customs employees' physical safety is threatened, and they may be tempted "not only by bribes from the traffickers with whom they deal, but also by their own access to ... valuable contraband seized and controlled by the Service ...." *Id.* The Court noted that internal Customs Service investigations from 1985 through 1987 resulted in

the arrest of 76 employees and 122 civilians. *Id.* at 1392-93. In addition, the Court upheld the testing of personnel whose promotion required the carrying of firearms because "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id.* at 1393.[7]

Thus, *Skinner* and *Von Raab* involved documented problems and real concerns directly related to drug abuse and the employees' fitness for duty, and the Court found that the government had fashioned a specific remedy that narrowly addressed those interests. The circumstances surrounding the DOJ Plan are vastly different, as is the government's proposed "remedy." First, as the district court below held and the court of appeals evidently accepted, there is no documented evidence of a drug problem within DOJ, nor of drug-related bribery, blackmail

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[7] *Von Raab* also indicated that testing of employees who have access to "truly sensitive" information may be justified in certain circumstances, but that the Customs Service did not make an adequate showing to justify such testing in that case. We discuss this rationale in part III, *infra*. For present purposes, it should be noted that (1) the testing proposed in that case arose in a non-random context; and (2) the type of "sensitive" information that could be compromised by Customs agents is far different -- and of greater potential interest to drug dealers who might attempt to bribe or blackmail federal employees -- than the "sensitive" information to which, *e.g.*, DOJ Antitrust Division lawyers might be exposed.

or threat, or even of a workplace accident or injury of any kind to justify drug testing of employees who hold sensitive positions.

Moreover, the OBD Plan's random testing scheme -- not triggered by an accident as in *Skinner* or by the employee's voluntary act in seeking a promotion as in *Von Raab* -- fails the requirement that it be narrowly tailored to the government's asserted interests. It was adopted, not in furtherance of any agency-specific problem, but simply because the President had ordered DOJ and all other federal agencies to create random drug testing plans. The Plan is simply a false panacea that does little to further any legitimate interests, and, instead, demoralizes our already overly-scrutinized federal workforce. Justice Scalia's comment in dissent in *Von Raab* -- "the impairment of individual liberties cannot be the means of making a point," 109 S. Ct. at 1401 -- is even more fitting here.

Further, the promotion-based testing at issue in *Von Raab* presented less of an intrusion on privacy than the DOJ Plan because "applicants know at the outset that a drug test is a requirement of those positions." *Id.* at 1394 n.2. The Court clearly viewed such searches as a defined gateway through which one may decline to pass.[8]

[8] The Court regarded a promotion-based testing program as analogous to routine highway checkpoint searches, in which motorists "are not taken by surprise as they know, or may obtain knowledge of,

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Random testing, unlike gateway testing, constantly hovers over individuals, unpredictable and inexorable, with severe consequences -- *e.g.*, potential dismissal for a first "positive" result, mandatory dismissal for a second. See DOJ Plan, Chapter 4.K (A-97-99). Also, the random testing challenged here infringes incumbent employees' settled expectations about the degree of privacy to which their jobs entitle them; none of these employees knew or had reason to know, when they accepted their positions with DOJ, that mandatory random testing would be a condition of employment, nor have they performed any other act that they reasonably could have expected would trigger such a test.[9]

In addition, the conditions of employment faced by train crews or Customs agents and their accordant diminished expectations of privacy cannot reasonably be

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the location of the checkpoints and will not be stopped elsewhere." *Von Raab*, 109 S. Ct. at 1394 n.2, *quoting United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976). In contrast, random drug testing is comparable to the random highway stops and searches held unconstitutional in *Delaware v. Prouse*, 440 U.S. 648 (1979), in that it may strike at any time and on short notice, giving employees no way both to avoid the invasion of privacy and retain their jobs.

[9] Of course, any employee suspected of drug abuse would be subject to the DOJ's "reasonable suspicion" testing plan, which petitioner in this case have not challenged.

equated to the working environment at DOJ. The railroads are "regulated pervasively to ensure safety"; in particular, train crews undergo periodic physical examinations to ensure their fitness, *Skinner*, 109 S. Ct. at 1418, while these DOJ employees have never been required to undergo any form of physical examination to secure or retain their employment or to receive a top secret clearance. See Declaration of D. Jerry Rubino, reproduced in the Joint Appendix in the court below at 176 (no requirement for physical examination to receive top secret security clearance). In *Von Raab*, the Supreme Court expressly distinguished Customs employees involved in drug interdiction from "most private citizens or government employees in general," who do not have a diminished expectation of privacy with respect to urinalysis. 109 S. Ct. at 1394 (emphasis added). DOJ employees such as petitioners never have been given reason to anticipate that the government would need to undertake randomly-timed searches of their bodies in order to ensure their fitness for work.

DOJ has made no showing that establishing individualized suspicion prior to testing is impracticable or would in any way hinder the government's objective of ferreting out drug use in the Agency. This Court stated in *Von Raab* that "[d]etecting drug impairment on the part of employees can be a difficult task, especially where, as here, it is not feasible to subject employees and their work-product to the kind of day-to-day scrutiny that is the norm in more traditional office environments," 109 S. Ct. at 1395. Here, petitioners work in precisely the "traditional

office environment" to which this Court referred in *Von Raab*.

If the court of appeals' decision in *Harmon* is allowed to stand, *Skinner* and *Von Raab* could easily become misinterpreted vehicles by which highly intrusive mandatory random drug testing is extended on a broad scale throughout the federal service. Already, for example, the government has taken the position that the reasoning of *Von Raab* should be extended to all employees with mere "secret" clearances, on a categorical basis.[10] This Court should act to prevent its narrowly-tailored decisions in those cases from being misused, at the expense of the civil liberties of federal employees.

III. The Categorical Approach Of The Court Below, Allowing Testing Of All Department of Justice Employees With Top Secret Clearances, Is Inconsistent With Von Raab, Excessive In Scope, And Unjustified In These Circumstances.

The *Harmon* court believed that *Von Raab* authorized categorical mandatory random drug testing of DOJ employees with top secret clearances. Relying on this Court's statements in *Von Raab*, "that the Government has a compelling interest in protecting truly sensitive

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[10] *See* Defendants' Motion for Summary Judgment filed July 14, 1989 in *Hartness v. Bush*, 712 F. Supp. 986 (D.D.C. 1989) (No. CA-89-0044).

information," and "that employees who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test under the Service's screening program," 109 S. Ct. at 1396-97, the court below determined that "[w]hatever 'truly sensitive' information includes . . . it encompasses top secret national security information" and that all DOJ employees with top secret clearances could, therefore, be subjected to drug tests irrespective of their actual access to highly sensitive information. *Harmon*, 878 F.2d at 491 (A-17).

Von Raab cannot plausibly be so extended. Indeed, this Court's careful and studied efforts to circumscribe promotion-based drug testing on the ground of access to classified information rebut the court of appeals' effort to extend *Von Raab* to random testing of all DOJ employees with top secret clearances.

In *Von Raab,* the Customs Service sought to subject to drug testing those employees with access to classified information. This Court rejected the Customs Service plan, noting that it was "not clear ... whether the category defined by the Service's testing directive encompasses only those Customs employees likely to gain access to sensitive information ... and this apparent discrepancy raises ... the question whether the Service has defined this category of employees more broadly than necessary ...." 109 S. Ct. at 1397. The court of appeals in that case was directed on remand to "examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric." *Id*. The court of appeals

was also instructed to "assess [] the reasonableness of requiring tests of these employees" by considering "pertinent information bearing upon the employees' privacy expectations, as well as the supervision to which these employees are already subject." *Id.*

The *Harmon* court simply ignored the analysis mandated by *Von Raab*. The court made no examination of whether individual DOJ employees with top secret clearances were "likely to gain access to sensitive information." *Von Raab*, 109 S. Ct. at 1397. Rather, the court simply approved testing all employees with top secret clearances on a blanket basis. The court justified this categorical approach, so starkly opposed to the court's analysis in *Von Raab*, as necessary, "to ensure that employees can be given access to top secret materials as soon as the need arises." *Harmon*, 878 F.2d at 492 (A-18). But subjecting employees to mandatory random testing on the mere possibility of access to truly sensitive information is a vast and unwarranted extension -- indeed, a repudiation -- of *Von Raab*.

DOJ made no showing that a case-by-case analysis of top secret clearance holders for these purposes would be in any way difficult. Moreover, such an analysis would likely have shown that many of the employees involved do not meet the Court's *Von Raab* requirements for testing those with access to truly sensitive information. In discussing the parameters of such testing, this Court relied on its decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988). *See Von Raab*, 109 S. Ct. at 1397. *Egan*

involved the denial of a security clearance to an individual who sought a job at a repair facility for nuclear submarines; thus, as the court below acknowledged, *Egan* deals with information "of the highest order of confidentiality." *Harmon*, 878 F.2d at 492 (A-19). The individual petitioners are not likely to gain access to such information, regardless of their top secret security clearances. Five of the petitioners are lawyers in the Criminal Section, Civil Rights Division; the remaining petitioners include three trial lawyers in the Criminal Division, one trial attorney in the Lands and Natural Resources Division, and the Freedom of Information Act Officer for the Antitrust Division. None of these petitioners is likely to encounter *Egan*-type national security information. For instance, petitioner Nelson Hermilla cites as examples of his access to national security information documents pertaining to the assassination of Martin Luther King and investigations of Ku Klux Klan members. See Declaration of Nelson Hermilla, reproduced in the Joint Appendix in the court below at 759. Petitioner Leo Neshkes cites his access to top secret documents obtained or created by the Antitrust Division of DOJ. See Declaration of Leo Neshkes, reproduced in the Joint Appendix in the court below at 782. Access to the foregoing "national security" information does not justify random drug testing. Moreover, many of these petitioners are unlikely to see any top secret information on a regular basis, and are typically not exposed to the type of information that would create a threat of bribery or blackmail by drug dealers.

The need for a case-by-case analysis of employees who hold top secret clearances becomes even more important in light of the documented problem of "overclassification" of classified documents. As former Soliciter General Erwin N. Griswold has observed,

> It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security but rather with governmental embarrassment of one sort or another. Apart from short-term classification and details of weapons systems . . . there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past.[11]

As noted, *Von Raab* also mandates that the reasonableness of subjecting employees with access to truly sensitive information be measured against the "employees' privacy expectations." 109 S. Ct. at 1397. There can be no doubt that, as with all urinalysis testing schemes, DOJ's program implicates substantial privacy interests. This Court spoke eloquently regarding those

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[11] Griswold, "Secrets Not Worth Keeping; The Courts and Classified Information," Washington Post, Feb. 15, 1989 at A25. *See also* 255 Cong. Rec. E384 (daily ed. Feb. 9, 1989) (comments of Rep.

interests in *Skinner*, 109 S. Ct. at 1413. Yet, the *Harmon* court said next to nothing about the DOJ employees' privacy interests, instead focusing exclusively on the validity of the governmental interests under *Skinner* and *Von Raab*. *Harmon*, 878 F.2d at 488-93 (A-10-19). While the court of appeals acknowledged that the type of privacy invasion entailed by a random plan was different from the invasion in *Von Raab* and *Skinner*, the court failed to find that distinction significant. *Id*. at 488-89 (A-10-12).

In fact, DOJ attorneys with top secret clearances have a much greater expectation of privacy with respect to random drug testing than do those Customs Service employees who are directly involved in drug interdiction and choose to subject themselves to non-random testing by seeking promotions or transfers. While DOJ employees must obey various professional standards and rules designed to guard against conflicts of interest, and must provide personal information about themselves on questionnaires when hired, such limitations on employee behavior do not involve a search or seizure in the constitutional sense. Most of the rules by which DOJ employees must abide are largely self-policing, and certainly do not contemplate any effort to investigate employee compliance, absent suspicion of wrongdoing.[12]

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[12] DOJ employees are subjected to background checks, but these checks do not involve physical examinations. See Declaration of D. Jerry Rubino, reproduced in the Joint Appendix in the court below at 176 (no mention of physical examination in background check).

Random drug testing differs not only in degree but in kind from the normal conditions of employment that plaintiffs accept.[13]

Finally, this Court in *Von Raab* concluded that a deterrent-based program was reasonable because, in the Customs Service, "it is not feasible to subject employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." 109 S. Ct. at 1395. In the DOJ context, such day-to-day scrutiny is both feasible and commonplace. DOJ employees are extensively supervised in their work, and major litigation decisions are reviewed at several levels. See Declarations of Mark B. Harmon, Patricia G. Chick, Rebecca P. Dick, Karla Dobinski, Lorna Grenadier, Nelson Hermilla, Eric Nagle, and Kathleen B. Nalty, reproduced in

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[13] DOJ has never sought to enforce any other standards of employee behavior by random mandatory testing programs. For example, 28 C.F.R. § 45.735-21(e) (1987) forbids habitual use of intoxicants to excess. Yet, DOJ employees are not tested for alcohol consumption on a random basis. DOJ employees, therefore, are not subject to any regulatory scheme within which they might have reason to anticipate random bodily searches. Nor may it be said that DOJ employees have "consented" in some fashion to mandatory urinalysis. A search, otherwise unreasonable, cannot be justified by a public employer's exaction of "consent" as a condition of employment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

the Joint Appendix in the court below at 705, 737-38, 744, 748, 755, 760, 771-72, 777-78. Once again, the *Harmon* court gave this consideration short shrift in determining the need for drug testing DOJ employees with top secret clearances.

As noted above, the government is already using *Von Raab* (and *Harmon*) to attempt to justify categorical random testing not only of "top secret" employees, but mere "secret" employees as well, without any individualized suspicion and without any individual analysis of whether their specific job duties justify such testing. This case presents this Court with an opportunity to prevent such an unwarranted extension of Von Raab.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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APPENDIX
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UNITED STATES COURT of APPEALS

FOR THE DISTRICT OF COLUMBIA

NO.

88-5265

September Term, 1988
CA 88-01766

Mark B. Harmon, *et al.*

v.

Richard L. Thornburgh, Attorney General of the U.S., *et al.*,

Appellants

BEFORE: Wald, Chief Judge; Silberman, Circuit Judges and Robinson, Senior Circuit Judge

ORDER

Upon consideration of appellants' petiton for rehearing it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPREE, CLERK

BY:
Linda Jones
Deputy Clerk

UNITED STATES COURT of APPEALS

FOR THE DISTRICT OF COLUMBIA

NO.

September Term, 1988
88-5265 CA 88-01766

Mark B. Harmon, *et al.*

v.

Richard L. Thornburgh, Attorney General of the U.S., *et al.*,

Appellants

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges, and Robinson, Senior Circuit Judge

ORDER

Appellants' Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPREE, CLERK

BY:
Linda Jones
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5265

MARK B. HARMON, et al.,
Plaintiffs,

v.

RICHARD L. THORNBURGH, et al.,
Defendants.

[Decided June 30, 1989]

Appeal from the United States
District Court for the District of Columbia

John R. Bolton, Assistant Attorney General, with whom Jay B. Stephens, United States Attorney, and Leonard Schaitman, United States Attorney, Department of Justice, were on the brief, for appellants.

Stephen H. Sachs, with whom Carl Willner, Arthur B. Spitzer and Elizabeth Symonds were on the brief, for appellees.

Before: WALD, *Chief Judge*, and ROBINSON and SILBERMAN, *Circuit Judges*.

Opinion for the court filed by *Chief Judge* WALD.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* SILBERMAN.

WALD, *Chief Judge*: Appellants Richard L. Thornburgh, *et al.*, on behalf of the United States Department of Justice ("DOJ" or "Department"), appeal from a permanent injunction issued by the district court. That injunction, as subsequently modified by this court, forbade DOJ to implement a random urinalysis drug-testing program covering three categories of Department employees: prosecutors in criminal cases, employees with access to grand jury proceedings, and personnel holding top secret national security clearances. We conclude that intervening decisions of the United States Supreme Court require that the injunction be modified to permit the testing of employees holding top secret clearances. We believe, however, that DOJ has failed to justify its requirement that all workers within the other two categories must submit to random drug testing. We therefore affirm the trial court's judgment as it pertains to these employees.

I. FACTS

A. *The Testing Program*

On September 15, 1986, President Reagan issued Executive Order No. 12,564, which called for various measures designed to create a "drug-free Federal workplace." 51 Fed. Reg. 32,889 (September 17, 1986). That order required, *inter alia*, that "[t]he head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions." *Id.* at 32,890. Pursuant to the Executive Order, the "Department of Justice Drug-Free Workplace Plan" (the "DOJ Plan") was issued on September 25, 1987, and amended

on December 17, 1987. On June 27, 1988, DOJ issued the "Department of Justice Drug-Free Workplace Program for the Offices, Boards and Divisions," OBD 1792.1 (the "OBD Plan"). On the same day, the Department notified its employees that random drug testing could begin as soon as 60 days thereafter.

Under the OBD Plan, five categories of DOJ employees in "sensitive" positions may be subjected to random drug testing.[1] These categories include (1) "[a]ll incumbents currently authorized to have access to top secret classified information in accordance with Executive Order 12356"; (2) "[a]ll attorneys responsible for conducting grand jury proceedings and all personnel deemed necessary to assist such attorneys in the performance of their duties"; (3) "[a]ll incumbents serving under Presidential appointments"; (4) "[a]ll incumbents whose assigned position duties include the prosecution of criminal cases"; and (5) "[a]ll incumbents whose assigned position duties include maintaining, storing or safeguarding a controlled substance . . . ." OBD Plan at 6 (J.A. 307). Under the OBD Plan, testing is to be conducted for marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP). *Id.* at 7 (J.A. 308).

An employee selected for random testing will be notified on "the same day, preferably within two hours, of the scheduled testing." DOJ Plan at 18 (J.A. 670). The Department's procedures for obtaining and testing urine specimens are governed by the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" issued by the Department of Health and Human Services (the

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[1] The OBD Plan also provides for applicant testing; probationary employee testing; reasonable suspicion testing; testing following an accident or unsafe practice; voluntary testing; and testing as part of or as a follow-up to counseling or rehabilitation. *See* OBD Plan at 6 (Joint Appendix ("J.A.") 307). Only the requirement of random testing is at issue in this case.

"HHS Guidelines"). *See* 53 Fed. Reg. 11,970 (April 11, 1988). After arriving at the test site, the employee will present photographic identification and will remove any outer garment such as a coat or jacket. The individual will be supervised by a monitor of the same gender, but will be allowed to urinate within a stall or partitioned area. The toliet water will be tinted with a bluing agent to ensure that the water is not used to adulterate the specimen. After the employee has furnished a specimen, the monitor will inspect the sample to ascertain that a sufficient volume is present, and that the sample is of normal color and temperature.

The laboratory to which specimens are sent will first employ an immunoassay test; any sample identified as positive will then be tested using gas chromatography/ mass spectrometry (GC/MS) techniques. If this second test confirms the positive result, a Medical Review Officer shall "review and interpret" the test, "examin[ing] alternate medical explanations for any positive test result." 53 Fed. Reg. 11,985. Before verifying a positive result, the Officer must allow the employee an opportunity to discuss the test.[2] If the Officer verifies the positive result, the employee will be removed from his sensitive position and will be subject to disciplinary proceedings. Possible penalties range from a reprimand to dismissal. *See* Declaration of Joseph A. Norris III at 15 (J.A. 468).[3]

B. *This Litigation*

The plaintiffs in this case include 38 attorneys, three paralegals, and one economist in various divisions of the Department of Justice. Plaintiffs all occupy positions which have been designated for, or may be subject to,

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[2] The employee might, for instance, attempt to demonstrate that the positive test result had been caused by her use of legally prescribed medication.

[3] Dismissal is required after a second finding of illegal drug use. *See* Norris Dec. at 15 (J.A. 468).

random drug testing. They filed suit on June 28, 1988, one day after the issuance of the OBD Plan. Their complaint requested that the district court declare the DOJ and OBD Plans to be unconstitutional; that it enjoin defendants from implementing drug testing under the Plans; and that it award costs and attorneys' fees. *See* Complaint at 20-21 (J.A. 28-29).

On July 29, 1988, the district court issued a preliminary injunction against the implementation of the OBD Plan. *Harmon v. Meese*, 690 F. Supp. 65 (D.D.C. 1988). The court noted that compulsory urinalysis, under our circuit's precedents, constituted a "search" governed by the fourth amendment.[4] *Id.* at 67. The trial judge also noted the absence of any documented drug problem within the Department. *Id.* at 68. The court concluded that the OBD Plan was unreasonable, and therefore proscribed by the Constitution, "because there is no nexus between fitness for duty, security and integrity on the one hand, and compulsory random urinalysis drug testing on the other, where no drug problem is believed to exist." *Id.* The court therefore ordered that "defendants are enjoined from implementing mandatory random drug testing by urinalysis in the Offices, Boards and Litigating Divisions of the Department of Justice under the 'Department of Justice Drug-Free Workplace Plan.'" *Id.* at 70. On the unopposed motion of the Department, the district court ordered that the preliminary injunction be made permanent. *Id.* On August 5, 1988, DOJ filed a notice of appeal.

In its brief to this court, the Department pointed out that none of the plaintiffs was a Presidential appointee, nor was any plaintiff responsible for maintaining, storing, or safeguarding controlled substances. *See* Brief for

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[4] *See* Jones v. McKenzie, 833 F.2d 335, 338 (D.C. Cir. 1987), *vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989); National Federation of Federal Employees v. Weinberger, 818 F.2d 935, 942 (D.C. Cir. 1987).

Thornburgh at 26 n.19, 32 n.24. Therefore, DOJ argued, the plaintiffs lacked standing to challenge the OBD Plan insofar as it mandated the random testing of these categories of employees. On December 16, 1988, the day after oral argument, this court ordered that the injunction be modified to permit the random testing of workers in these categories. At present, therefore, the controversy is limited to the Department's requirement of random drug testing for federal prosecutors, workers with access to grand jury proceedings, and employees holding top secret national security clearances.

C. *Intervening Supreme Court Decisions*

Our disposition of this case is guided—and, to a large extent, controlled—by the Supreme Court's recent decisions in *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), and *Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402 (1989). In *Von Raab*, the Court upheld the requirement that workers seeking transfer or promotion to specified positions within the United States Customs Service must undergo urinalysis. In *Skinner*, the Court sustained Federal Railroad Administration regulations which required blood and urine tests for train workers in the event of certain types of railway accidents. These regulations also permitted, but did not require, the testing of employees who had been found to violate certain safety rules.

From these decisions certain general principles may be gleaned. Urinalysis, if compelled by the government, is a "search" subject to the restrictions of the fourth amendment. *See Skinner*, 109 S. Ct. at 1412-13; *Von Raab*, 109 S. Ct. at 1390. However, individualized suspicion of a particular employee is not required by the Constitution. *See Skinner*, 109 S. Ct. at 1417; *Von Raab*, 109 S. Ct. at 1390. Nor is it necessary that a documented drug problem exist within the particular work-

place at issue. *See Von Raab*, 109 S. Ct. at 1395 ("The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity."). Rather, "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 109 S. Ct. at 1390; *accord*, *Skinner*, 109 S. Ct. at 1413-14.

The Supreme Court recognized three governmental interests which might, in appropriate circumstances, be sufficiently compelling to justify mandatory testing even in the absence of individualized suspicion. First, the government's interest in maintaining the integrity of its workforce was held to justify the testing of all Customs Service employees seeking transfer to positions involving the interdiction of illegal drugs. *See Von Raab*, 109 S. Ct. at 1393. Second, the suspicionless testing of train workers, or of Customs Service employees who carry firearms, was upheld as a legitimate means of enhancing public safety. *See Skinner*, 109 S. Ct. at 1419 ("Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."); *Von Raab*, 109 S. Ct. at 1393. Finally, the Court stated that the government's "compelling interest in protecting truly sensitive information," *Von Raab*, 109 S. Ct. at 1396, could under some circumstances furnish an adequate justification for the suspicionless testing of individuals whose jobs would involve access to classified materials.

Following the issuance of these decisions, we requested that the parties file supplemental briefs addressing the relevance of *Skinner* and *Von Raab* to our disposition of

the present case. The plaintiffs contend that neither of the Supreme Court's decisions authorizes the testing program at issue here, and that the district court's injunction should therefore be maintained. DOJ, by contrast, argues that its testing program is quite similar to those upheld in *Skinner* and *Von Raab* and that the injunction should therefore be vacated in its entirety.

II. Analysis

A. *Skinner and Von Raab*

Our analysis centers on the two decisions recently issued by the Supreme Court. Of the two, *Von Raab* is more closely on point. In *Skinner*, the Court upheld regulations under which drug testing would be contingent on an event—such as a train accident or a rule violation by a particular employee—which furnished an indication that some dereliction of duty had occurred. Although post-accident testing requires no individualized suspicion of any particular employee, it at least requires concrete evidence that events have not gone as planned. The testing program upheld in *Von Raab*, by contrast—like the program at issue here—included no such requirement. Moreover, *Skinner* relied entirely on a single governmental interest: the protection of the public from immediate threats to physical safety. Portions of *Von Raab* relied on that interest, but the Court also discussed the circumstances under which the state's need to ensure the integrity of its workforce, or the necessity of preventing the disclosure of confidential information, might justify the testing of public employees.

Application of *Von Raab* to the facts of the present case presents a delicate task. The *Von Raab* majority made no effort to articulate an analytical rule by which legitimate drug-testing programs could be distinguished from illegitimate ones. It simply weighed individual privacy interests against the government's policy ob-

jectives, enumerating several factors that it deemed relevant in performing this balancing process. The Court did not, however, indicate whether it deemed the case a close one, in the sense that minor variations in the facts would have tipped the balance in the other direction.[8] Nor did it indicate which (if any) of the relevant factors would be *essential* to a constitutional testing plan.

In their supplemental brief, appellees draw our attention to two basic distinctions between the plan at issue here and the testing program upheld in *Von Raab*. One distinction involves the differing working environments of DOJ and Customs Service employees. The Court in *Von Raab* noted that "[d]etecting drug impairment on the part of employees can be a difficult task, especially where, as here, it is not feasible to subject employees and their work-product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." 109 S. Ct. at 1395. DOJ employees, by contrast, work in "traditional office environments," in which drug use is, presumably, more easily detected by means other than urine testing. Though this is surely one element to be weighed in the balance, the *Von Raab* Court gave no indication that it deemed this factor to be one of overriding significance.

Appellees also point out that the OBD Plan challenged here involves *random* testing; the Customs Service required testing only for employees seeking transfer or promotion to a covered position. While the Customs plan mandated testing on a single occasion, a DOJ employee could, at least in theory, be subjected to repeated testing over the course of his career. More importantly, under the Customs program an individual's obligation to undergo testing can be triggered only by her own decision to

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[8] *Von Raab* was decided by a 5-4 vote, and in that sense was a close case. It is not clear, however, whether any of the five Justices in the majority regarded the Customs Service plan as being near the line separating legitimate from illegitimate drug testing programs.

alter her status within the Service. A DOJ worker in a sensitive position, by contrast, may decline to be tested only if she is willing to relinquish a job she already holds.[6]

The invasion of privacy occasioned by the OBD Plan might therefore be regarded as different in kind from the intrusion at issue in *Von Raab*. And a coherent theory might be constructed which would make this a fundamental distinction. In our view, however, the Supreme Court has not encouraged the construction of such a theory. The Court in *Von Raab* did point out that "[o]nly employees who have been tentatively accepted for promotion or transfer to one of the three categories of covered positions are tested, and applicants know at the outset that a drug test is a requirement of those positions." 109 S. Ct. at 1394 n.2. The Court's discussion of this point, however, was confined to a footnote; even within this footnote, moreover, it was identified only as one of several factors which, taken together, would "significantly minimize the intrusiveness of the Service's drug screening program." *Id.* Certainly the random nature of the OBD testing plan is a *relevant* consideration; and, in a particularly close case, it is possible that this factor would tip the scales. We do not believe, however, that this aspect of the program requires us to undertake a fundamentally different analysis from that pursued by the Supreme Court in *Von Raab*.

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[6] *Cf.* United States v. Edwards, 498 F.2d 496, 500-01 (2d Cir. 1974) (airport security inspection is rendered less intrusive by the fact that an individual may avoid the search by declining to travel by air).

The Supreme Court has recognized in other contexts that "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job." Wygant v. Jackson Board of Education, 476 U.S. 267, 282-83 (1986) (plurality opinion). The *Wygant* plurality reasoned that an affirmative action hiring plan is preferable to a plan involving layoffs, because "[t]hough hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose." *Id.* at 282.

B. *Governmental Interests*

In its supplemental brief to this court, the Department contends that each of the three governmental interests relied upon by the Court in *Von Raab*—integrity of the workforce, public safety, and protection of sensitive information—furnishes an adequate justification for the OBD Plan. We examine these governmental interests in turn.

1. *Integrity*

The broadest theory advanced by DOJ at oral argument was that its interest in ensuring the integrity of its workforce would justify the random drug testing of every federal employee. Certainly that theory finds no support in *Von Raab*. The Court there noted that "[u]nlike most private citizens *or government employees in general*, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity." 109 S. Ct. at 1394 (emphasis added). We do not, of course, question the obvious principle that the government has a legitimate interest in ensuring that its employees obey the law. The issue is whether that interest is sufficiently compelling to justify a search. *Von Raab*, it seems to us, suggests that federal employment alone is not a sufficient predicate for mandatory urinalysis.[7]

Nor is it sufficient in our view that DOJ employees are, broadly speaking, engaged in law enforcement. Again, it is beyond dispute that those who enforce the law have a particular obligation to obey it. *Von Raab*, however, suggests that the government may search its employees only when a clear, direct nexus exists between

[7] The *Von Raab* Court remanded for further proceedings to determine which Customs workers could be tested based upon their access to "sensitive" materials. This additional inquiry would of course be superfluous if *all* public employees could be subjected to testing on the integrity rationale.

the nature of the employee's duty and the nature of the feared violation. The Court emphasized the particular dangers inherent in drug use by employees directly engaged in drug interdiction. No such nexus is present in this case. The fact that a DOJ employee is a federal prosecutor, has access to grand jury proceedings, or holds a security clearance in no way identifies her as an employee responsible for the enforcement of federal narcotics laws.

In its supplemental brief, DOJ argues that "[i]t would make little sense to say that the 'national interest in self protection' vis-a-vis illegal drug trafficking applies to the Customs agent who makes the arrest but not to the Justice Department prosecutor who handles the matter from that point on." Supplemental Brief for Thornburgh at 5 n.5. In discussing the integrity rationale, the Supreme Court emphasized that the "national interest in self protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." *Von Raab*, 109 S. Ct. at 1393. Certainly this reasoning applies with equal force to the DOJ attorney who prosecutes federal drug cases. The Court also noted, however, that Customs officials engaged in drug interdiction "may be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service." *Id.* at 1392. No such concern is present here.[8] The analogy suggested by DOJ must therefore be regarded as substantial but imperfect.

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[8] Pursuant to our modification of the district court's injunction, DOJ is permitted to test employees "whose assigned position duties include maintaining, storing or safeguarding a controlled substance." *See* OBD Plan at 7 (J.A. 308). If any federal prosecutors have access to contraband held by DOJ, they could presumably be subjected to testing based upon their membership in this category of employees.

It seems quite possible that the Department might constitutionally fashion a random drug-testing program for all DOJ employees having substantial [9] responsibility for the prosecution of federal drug offenders. We need not resolve that question now, however, since DOJ has not, as yet, fashioned such a program.[10] The government has not so far identified a separate category of drug prosecutors, but instead has required that *all* employees who prosecute criminal cases must undergo random testing. We do not believe, however, that under *Von Raab* an attorney who prosecutes antitrust or securities fraud cases can plausibly be analogized to a customs agent whose job is drug interdiction. We therefore conclude that the government's integrity interest cannot justify the testing of any one of the three broad caegories at issue here.

2. *Public Safety*

In both *Skinner* and *Von Raab*, the Court held that the government's legitimate interest in protecting public safety could justify the suspicionless drug-testing of some

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[9] Judge Silberman argues that "it is hard to imagine a principled constitutional line that could be drawn between" employees having "substantial" and "insubstantial" responsibility for the prosecution of drug offenses. *See* Silberman op. at 4. Certainly any standard developed by the courts to determine substantiality will be imprecise and thus, to some degree, "unprincipled." That imprecision, however, seems not merely consistent with, but in fact required by, the Supreme Court's opinion in *Von Raab*. The Supreme Court has quite clearly eschewed an approach to drug testing based on bright lines and clean analytic principles, and has instead mandated case-by-case balancing of individual and societal interests.

[10] We believe that the burden should fall on DOJ to redefine a new category of employees eligible for random urinalysis, rather than on this court to identify the individuals within the agency's current broad categories who may be subjected to testing. *See infra*, pp. 17-25.

employees. The Department contends that the duties of workers covered by the OBD Plan raise comparable public safety concerns. We do not agree.

Certainly a blunder by a Justice Department lawyer may lead, through a chain of ensuing circumstances, to a threat to public safety. That sort of indirect risk, however, is wholly different from the risk posed by a worker who carries a gun or operates a train. The Supreme Court in *Von Raab* emphasized that

> Customs employees who may use deadly force plainly "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." [quoting *Skinner*, 109 S. Ct. at 1419] We agree with the Government that the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force . . . . Because successful performance of their duties depends uniquely on their judgment and dexterity, those employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness.

109 S. Ct. at 1393, 1394.

The public safety rationale adopted in *Von Raab* and *Skinner* focused on the *immediacy* of the threat. The point was that a single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before the harm occurs. *Von Raab* provides no basis for extending this principle to the Justice Department, where the chain of causation between misconduct and injury is considerably more attenuated.

3. *"Sensitive" Information*

The government's supplemental brief places primary emphasis on the governmental interest in protecting confidential information. The Customs program at issue in *Von Raab* mandated drug testing for those seeking promotions to positions where they would be required to handle classified materials. The Court stated: "We readily agree that the Government has a compelling interest in protecting truly sensitive information . . . . We also agree that employees who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test under the Service's screening program." 109 S. Ct. at 1396, 1397. The Court did not define the contours of "truly sensitive" information (although the Customs regulations themselves spoke of "classified" materials).

Whatever "truly sensitive" information includes, we agree that it encompasses top secret national security information.[11] We therefore hold that the injunction must be dissolved as to the third category of employees. There is admittedly some merit to the plaintiffs' contention that "[i]t is reasonable to expect that many individuals holding security clearances do not regularly see or have never actually seen any top secret information, but were merely given such clearances because their duties might at some point call for review of such material." Supplemental Brief for Harmon at 9. On balance, though, we think it would not be desirable to ask the Department to draw distinctions, within the class of attorneys holding top secret security clearances, between attorneys who do and

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[11] Executive Order No. 12,356 provides that national security information shall be classified at one of three levels: "top secret," "secret," or "confidential." Top secret materials are of the highest order of confidentiality: this designation applies only to "information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security." 47 Fed. Reg. 14,874 (April 6, 1982).

those who do not deal with such materials on a regular basis. The whole point of granting top secret security clearances in advance is to provide flexibility, to ensure that employees can be given access to top secret materials as soon as the need arises. If submission to drug testing can legitimately be made a requirement for access to top secret materials—and *Von Raab* indicates as much—then the government may properly make testing a requirement for holding a top secret security clearance.

A different result is not compelled by the fact that the OBD Plan, unlike the Customs program, involves the *random* testing of employees who work within a "traditional office environment." These factors are relevant to our analysis, and in a borderline case they might tip the scales. But whatever the precise scope of "truly sensitive" information, it seems evident that top secret national security materials lie at its very core. We therefore believe that the government's interest in protecting these materials outweighs the employees' privacy interest, despite the fact that the OBD testing program is somewhat more intrusive than the plan upheld in *Von Raab*.

We do not believe, however, that the government's interest in preserving all its secrets can justify the testing of all federal prosecutors or of all employees with access to grand jury proceedings. We recognize that every employee within the three categories will have access to information which he is duty-bound not to divulge. But whatever the precise contours of "truly sensitive" information intended by the *Von Raab* Court, we believe that the term cannot include *all* information which is confidential or closed to public view. A very wide range of government employees—including clerks, typists, or messengers—will potentially have access to information of this sort. Moreover, the obligation to maintain confidentiality lies at the heart of every lawyer's ethical responsibility. The fact that the employees covered by the De-

partment's drug testing regulations deal with confidential information therefore does not distinguish them from private attorneys, or from government employees generally.

The Supreme Court in *Von Raab* did not define precisely what categories of information would be sufficiently "sensitive" to warrant mandatory drug testing. It seems to us, however, that the Court gave indications that caution should be used in approving this justification for testing. The principal case cited in support of the proposition that "the Government has a compelling interest in protecting truly sensitive information," 109 S. Ct. at 1396, was *Department of the Navy v. Egan*, 108 S. Ct. 818 (1988). *Egan* upheld the denial of a security clearance to an individual who sought a job at a repair facility for nuclear submarines: the information at issue in that case was of the highest order of confidentiality. The *Von Raab* Court, relying in part on *Egan*, agreed in principle that under some circumstances the government's interest in protecting its secrets would be a sufficient predicate for a drug-testing program. At the same time, though, the Court expressed concern as to "whether the Service has defined this category of employees more broadly than necessary to meet the purposes of the Commissioner's directive," 109 S. Ct. at 1397, and remanded for further consideration by the court of appeals. Against this backdrop, we must conclude that the confidentiality rationale cannot justify the testing of all DOJ employees within the first two broad categories at issue here.

C. *Remedy*

On remand, the district court is instructed to modify the injunction so as to permit the testing of all employees covered by the OBD Plan who hold top secret national security clearances. We see no basis on which this portion of the injunction may be sustained, since our reading of *Von Raab* leads us to the conclusion that every in-

dividual within this category may be subjected to mandatory testing. The other two categories of covered employees present a more difficult question. We believe, for the reasons stated above, that the categories as currently drawn cannot be sustained. Yet we must acknowledge the distinct possibility that some workers within these categories may perform duties so closely tied to the enforcement of federal drug laws that they could constitutionally be required to undergo testing.

Judge Silberman's view is that this court should determine which employees may and may not constitutionally be subjected to testing, and that we should then instruct the district court to modify the injunction accordingly.[12]

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[12] Our colleague, we would note in passing, is not altogether consistent as to what the proper scope of the injunction should be. His central criticism of our approach is that we have declined to vacate the injunctions as to drug prosecutors; he states that "[t]he injunction, in my view, must be further modified insofar as it prevents drug testing of those Justice Department employees who are engaged in the investigation and prosecution of drug cases." Silberman op. at 8. Other portions of his opinion state, however, that the injunction should be limited to *named plaintiffs*, *see id.* at 6 n.3, 9. The Department has never challenged the injunction on this ground, and we need not resolve the question here. We do, however, offer two brief observations on this point.

First, the contention that named plaintiffs alone should be protected by the injunction is distinct from, and in fact quite inconsistent with, the claim that injunctive relief should be limited to employees who do not prosecute drug cases. The two arguments cannot be blurred together simply because both are in some sense attacks on the breadth of the injunction. If injunctive relief is appropriate for named plaintiffs only, then the current injunction would be unlawful even if the Supreme Court in *Von Raab* had held that *no* public employee could be subjected to random urinalysis.

Second, if Judge Silberman's position is correct, then it would seem that the injunction was unduly broad even before *Skinner* and *Von Raab* were issued. Our colleague's approach would suggest that the district court should, at the outset, have issued an injunction applicable only to named

Our colleague's approach is grounded in the principle that injunctions issued by federal courts should be no broader than necessary to remedy the violation complained of. *See, e.g., Gulf Oil Corp. v. Brock*, 778 F.2d 834, 842 (D.C. Cir. 1985) (noting "the requirement that an injunction must be narrowly tailored to remedy the harm shown"). To the extent that the current injunction proscribes lawful as well as unlawful testing, our colleague argues, it represents a judicial usurpation.

Judge Silberman's argument is not without force. Recent Supreme Court decisions have revealed an increasing willingness to separate valid from invalid applications of overbroad statutes, and to enjoin enforcement only insofar as the statute operates unlawfully. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *United States v. Grace*, 461 U.S. 171 (1983). If there were some clearly defined subset of federal prosecutors who could plainly be subjected to random testing, and if it were apparent that the Department would wish to test those employees even if it could not test other prosecutors, then there would be litttle point in retaining the injunction as it applied to that group of workers. In the present case, however, countervailing considerations make us reluctant to decide, at this stage of the litigation, precisely which employees may and may not be tested.

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plaintiffs. Moreover, it would suggest that this panel was wrong when we modified the injunction to eliminate two of the categories without also modifying it to eliminate nonplaintiffs. Certainly *Von Raab* has changed our conception of *which* employees are similarly situated: drug prosecutors and securities fraud prosecutors, who previously seemed to be similarly situated, now may fall into different categories. But there is nothing in *Von Raab* which addresses the more general question of whether similarly-situated nonplaintiffs should be covered by the injunction in the first place.

Our reluctance stems in part from our obligation to avoid unnecessary or premature constitutional rulings.[13] We simply do not know whether the Department would choose (for example) to test drug prosecutors if it could not test other prosecutors as well,[14] and we are hesitant to decide whether such a plan would be constitutional in the absence of any indication that it will be adopted.[15] Our reluctance is heightened by the absence of any meaningful argument by the parties on this question. Up to this point, the government has argued that all of the employees covered by the plan can be forced to undergo testing; the plaintiffs have argued that none of them can. The parties simply have not joined issue concerning the appropriate course of action in the event that some of these workers are deemed subject to testing while others are not.[16]

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[13] *See, e.g.*, Meredith Corp. v. FCC, 809 F.2d 863, 870 (D.C. Cir. 1987) (court's inquiry is shaped by "our duty to avoid unnecessary constitutional adjudication"); Ashwander v. TVA, 297 U.S. 288, 345-48 (1935) (Brandeis, J., concurring).

[14] This problem did not arise in *Von Raab*, since the Customs Service itself had identified a distinct category of agents engaged in drug interdiction.

[15] We do not suggest that the agency is permitted to test only those employees who can "plainly" be subjected to testing. *See* Silberman op. at 9. Our point is simply that any ultimate attempt (by either DOJ or the courts) to determine precisely which workers may be tested is likely to involve extremely difficult line-drawing problems. The agency, of course, retains the prerogative of extending its program to the very limit of its constitutional authority. *Ashwander* principles, however, counsel hesitation on the part of the courts: when the location of the constitutional boundary remains in doubt, we should not attempt to define that boundary in advance of the necessity for doing so.

[16] The plaintiffs did address this point indirectly in a footnote in their supplemental brief. The plaintiffs acknowledged the possibility that employees who regularly dealt with top secret information might be subjected to testing, but argued

Our disposition of this case is also in keeping with the fundamental principle that agency policy is to be made, in the first instance, by the agency itself—not by courts, and not by agency counsel. When a court finds that an agency regulation is invalid in substantial part, and that the invalid portion cannot be severed from the rest of the rule,[17] its typical response is to vacate the rule and remand to the agency.[18] Courts ordinarily do not attempt, even with the assistance of agency counsel, to fashion a

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that the DOJ testing plan improperly included workers who had received clearances but never actually inspected top secret materials. If this court adopted that analysis, plaintiffs argued, it should not "requir[e] the District Court to perform the burdensome task of assessing the constitutionality of testing employees in each of potentially hundreds or thousands of individual positions for which top secret clearances have been granted, but should retain the injunction against the Department's program as presently designed." Supplemental Brief for Harmon at 9 n.10.

[17] We do not believe that the same sorts of problems are posed by our decision to permit the testing of employees holding top secret security clearances. Our exclusion of these employees from the injunction—like our earlier modification of the injunction to permit the testing of Presidential appointees and employees whose jobs involve the supervision of drug supplies—admittedly reflects a judgment that the OBD Plan "was not an undifferentiated whole." *See* Silberman op. at 8. Put another way, our treatment of this question reflects a determination that the different categories of employees identified by DOJ are severable from each other. But the decision to sever one discrete regulatory provision from another—by adhering to the lines drawn by the agency itself—is wholly different from an attempt to construct a new category.

[18] *See, e.g.*, Global Van Lines, Inc. v. ICC, 804 F.2d 1293, 1305 n.95 (D.C. Cir. 1986) ("when an agency committing an error of law has discretion to determine in the first instance how it should be rectified, the proper course is to remand the case for further agency consideration in harmony with the court's holding").

valid regulation from the remnants of the old rule.[19]

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[19] We are somewhat perplexed by Judge Silberman's suggestion that the "Department of Justice Drug-Free Workplace Program for the Offices, Boards, and Divisions," OBD 1792.1, is not a "plan" or regulation, *see* Silberman op. at 5-10, and that ordinary principles of administrative law are therefore inapplicable. The DOJ and OBD Plans were official agency documents, scarcely analogous to "a speech by the Attorney General," *id.* at 7. (If the intention to test the Department's employees had been expressed in such a speech, and if DOJ workers had thereupon filed suit, it might well be contended that their injury was "speculative," that they therefore lacked standing, and that the case was unripe.) The Plans were adopted pursuant to Executive Order 12,564: that Order required that "[t]he head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace" and that "[t]he head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions." 51 Fed. Reg. 32,890 (September 17, 1986). In order to provide uniformity among executive agency drug-testing programs, Congress has also established standards with which agency testing plans must comply. *See* Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987). *See also* DOJ Plan at 1-2 (J.A. 653-54). The DOJ and OBD Plans would appear to be paradigmatic examples of "matter[s] relating to agency management or personnel," *see* 5 U.S.C. § 553(a)(2). As such they are exempt from the *procedural* (notice-and-comment) requirements of the Administrative Procedure Act, *see* Stewart v. Smith, 673 F.2d 485, 496-500 (D.C. Cir. 1982). Our *substantive* review of the testing requirements, however, is nevertheless guided by the fundamental principle that the agency, not the court, is responsible for the formulation of policy.

Nor is it especially relevant that this case involves a suit for injunctive relief in district court rather than a petition for review to the Court of Appeals. The Administrative Procedure Act strongly suggests that the two avenues of review are analogous. *See* 5 U.S.C. § 703 ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form

Were we to hold that the current injunction should not apply to drug prosecutors, we would be drawing a line which the agency itself has never drawn.[20] Moreover, that line would not be self-defining: the district court would be compelled to hear evidence and arguments, and then to determine which individual employees qualified as "drug prosecutors." We think it is more appropriate that any such determination should be made and subsequent identification criteria should be formulated, as an initial matter, by the agency rather than by the court.[21]

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of legal action, including actions for . . . mandatory injunction . . . in a court of competent jurisdiction."). *See also* Hameetman v. City of Chicago, 776 F.2d 636, 640 (7th Cir. 1985) ("When an administrative action is judicially reviewable but no statute specifies the route to take to get judicial review, an aggrieved party can bring a suit against the responsible officials in a federal district court under 28 U.S.C. § 1331, the general federal-question statute . . . . Such a suit resembles an equity suit but is actually a review proceeding rather than an original proceeding."). Finally, this case does not cease to involve review of agency action simply because the underlying claim is constitutional in nature. The Administrative Procedure Act makes clear that judicial review of agency action extends to the consideration of claims that the agency has behaved in a manner "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

[20] Our point is not (as Judge Silberman suggests) "that a court reviewing an agency action will not entertain arguments not relied upon by the agency," Silberman op. at 7. Our colleague's proposed solution—that the court should define a category of "drug prosecutors" and vacate the injunction as to them—is in our view objectionable not because it invokes a new *argument* to sustain the agency's rule, but because it sustains a rule which the agency has never adopted at all.

[21] Traditional administrative law principles may also be relevant in addressing the claim that named plaintiffs alone should be protected by the injunction. When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.

In our view, the best course of action at this time is to retain the current injunction against the Department's requirement that all federal prosecutors and all employees having access to grand jury proceedings may be subjected to random urinalysis. DOJ, of course, remains free to promulgate new, narrower regulations, subject to the review of the district court. This disposition ensures that agency policy will be fashioned, in the first instance, by the agency itself. Moreover, any ultimate judicial pronouncement concerning the precise scope of the Department's testing power will occur within the context of review of a concrete agency policy choice: neither this court nor the district court need address the abstract question of what classification scheme the agency *might* choose to adopt.

For these reasons, we believe that agency reformulation of its policy, not further modification of the injunction by the district court, is the preferable next step in dealing with the overbreadth of the Department's current testing program.[22] We recognize, however, that DOJ has not, as yet, been heard from on this issue. We therefore leave open the possibility that the Department might persuade the district court that further modification of the injunction would be appropriate, even in the absence of new regulations. Should the agency make such a request, however, it should be prepared to explain why such a modification will neither transfer policymaking authority from the agency to the court, nor embroil the court in an abstract or hypothetical dispute.[23]

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[22] We see no reason that agency reformulation of its policy should cause undue delay, especially since the Department's new testing criteria, as noted earlier, *see supra* n. 19, would not be subject to the notice-and-comment requirements of the Administrative Procedure Act.

[23] It is possible that DOJ will argue on remand that the injunction should apply only to named plaintiffs, not to similarly-situated agency employees. *See supra*, n.12. Though we do not foreclose this argument, we do note that nothing

D. *Conclusion*

We conclude that all DOJ employees holding top secret national security clearances may constitutionally be required to undergo random urinalysis. The district court should therefore modify the current injunction so as to permit the testing of individuals within this category. The injunction should, however, be maintained insofar as it prohibits the Department from implementing its current plan to test all federal prosecutors and all employees having access to grand jury proceedings. The case is remanded to the district court for further proceedings not inconsistent with this opinion.

Judgment accordingly.

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prevented the Department from advancing this contention on its initial appeal. If DOJ seeks on remand to attack the injunction on this basis, it must rebut the presumption that an argument not raised on an initial appeal will thereafter be deemed waived. *See* Northwestern Indiana Telephone Co., Inc. v. FCC, 872 F.2d 465, 470 (D.C. Cir. 1989); Laffey v. Northwest Airlines, 740 F.2d 1071, 1089-90 (D.C. Cir. 1984).

SILBERMAN, *Circuit Judge*: *concurring in part and dissenting in part*:

I.

I agree with the majority that the Attorney General may constitutionally implement his drug-testing plan as applied to all employees who hold top security clearances. I also agree that employees covered by the plan because they have access to grand jury information unrelated to investigation or prosecution of drug offenses may not be tested. Virtually all government employees are privy to *some* confidential information, and if that factor were deemed sufficient to justify drug testing the Supreme Court in *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), would have adopted a broader rationale. We judges and lawyers tend to be particularly sensitive to the secrecy of grand jury proceedings, but with regard to the government's interest in preserving confidentiality, it is hard for me to distinguish between a grand jury and, for instance, the Department of Agriculture's annual crop estimates or the Department of Labor's (and Commerce's) monthly consumer price indices. Like the majority, I do not think the Court's conclusion that employees with access to "truly sensitive information" can be tested permits testing of those with access to confidential information, at least on these grounds.

I further believe the majority quite correct in suggesting that under *Von Raab*, the government can test federal prosecutors and their support staff engaged in drug prosecutions. Maj. op. at 15. My reading of *Von Raab* convinces me that the government has the constitutional authority to test all of its employees involved in the investigation and prosecution of drug-related offenses. Central to that conclusion is my appraisal of the government's interest in so doing in light of *Von Raab*'s analysis. The Customs Service personnel involved in *Von Raab* were, to be sure, described by the majority as the "first

line of defense," 109 S. Ct. at 1392, and "front-line interdiction personnel," *id.* at 1393, who are "often exposed to th[e] criminal element and to the controlled substances they seek to smuggle into the country," *id.* at 1392. It might be thought, therefore, that prosecutors and their support staff, who are somewhat more removed from direct contact with the criminal element, are in less danger of contamination. But I think the key sentence in *Von Raab* is the following:

> This national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics.

Id. at 1393.

Justice Scalia, in a strong dissent, argued that the government's true interest—upon which he accused the majority of being unwilling to rely—was mere symbolism rather than concern that any significant number of Customs Service officials would be corrupted through contact with illegal drug purveyors. Although the majority did not respond to the dissent—which makes it more difficult for us to understand the scope and rationale of the opinion—it seems to me Justice Scalia must have a point, although not quite so broad as he contends.

The majority clearly accepted the government's argument that its efforts to stop drug trafficking and use in the United States were best analogized to a war; the adoption of its metaphors ("front-line interdiction personnel" and "first line of defense") makes that quite obvious. In time of war the morale of a nation's civilians is almost as important as that of its fighting troops. Any indication that members of the armed forces are sympathetic to the enemy, or to practices characteristic of the enemy, is so destructive of both military and civilian morale that it cannot be tolerated. Can one imagine, for instance, the U.S. government remaining indifferent dur-

ing World War II to an open display of fealty to Nazi tenets or symbols on the part of even a single soldier? Any such development, no matter how isolated, would have been perceived as enormously dangerous—much more so than if it had occurred (which it occasionally did) among the civilian population. The American people expect that those entrusted with the responsibility of fighting our nation's enemies do so with absolute loyalty and full commitment to the struggle. Anything less would risk the nation's survival. Thus, even an isolated departure from that commitment threatens to have a disproportionate negative impact on the nation's morale.

The analogy may not be precise, but the federal government's efforts to contain and beat back the drug scourge that affects our society depend importantly on convincing all Americans that drug use is as much a danger to them and to our country as is an external enemy. Obviously, millions of Americans are not yet persuaded. That appears to explain why the Supreme Court—notwithstanding the lack of evidence that a substantial number of Customs Service personnel use drugs—approved the drug-testing program. If even one Customs agent were discovered to be a drug user, the ensuing publicity, both within the agency and without, would likely have a far more corrosive impact on the government's effort to fight drug use than would the conduct of that one agent.

Federal prosecutors and their support staff engaged in drug prosecution are no less committed to the war against drugs than are the Customs Service personnel. They are, in this sense, drug warriors. The down-side risk of having even one of them discovered as an apostate, as a traitor who consorts with and aids the government's and society's mortal enemy, is, as with the soldier in wartime, disproportionately large. For that reason, I think that all those employees in the Justice Department whose respon-

sibilities are related to drug prosecution may be tested under the Attorney General's program.[1]

Nor do I think it matters, as the majority suggests, how "substantial" or how frequent an employee's involvement is in the investigation and prosecution of drug crimes. Just as the Court in *Von Raab* thought testing of Customs Service employees was constitutionally reasonable even if very few had even manifested any drug corruption, so I think that it cannot matter constitutionally whether an attorney is spending five or fifty percent of his working time prosecuting drug cases.[2] If, as I read *Von Raab*, the real government interest is the avoidance of any indication that a government employee enlisted in the war against drugs is himself corrupted by the evil sought to be contained, it matters not whether that employee is a part-time or full-time warrior. The harm to the government caused by a defection is virtually the same in either event. And, of course, it is hard to imagine a principled constitutional line that could be drawn between the two. As with those carrying top-secret clearance—whom the majority permits to be tested regardless of their actual access to classified materials, *see* Maj. op. at 15—the Justice Department needs the freedom and flexibility to deploy attorneys and support staff within those criminal investigations and prosecution units that, *inter alia*, have responsibility for attacking drug-related crimes.

As a practical matter, my reading of *Von Raab* would probably authorize testing of all employees in the Criminal Division of the Justice Department, depending on its present organization, as well as employees in the criminal

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[1] I confess to grave doubts that the criminal law is the most effective way of dealing with our drug problem--but that question is, of course, not for judges to decide.

[2] To be sure, there may be close cases among the plaintiffs or those similarly situated to a plaintiff, *see infra* n.3, but they are for the district court to resolve.

sections of the U.S. Attorney's offices and related bureaus and offices (including, of course, the Bureau of Prisons). The more difficult question for me is the permissibility of testing those employees in the criminal sections of other litigating divisions of the Department who are engaged in criminal investigation and prosecution, but *never* involved with drug-related crime. It could be argued that the government has a powerful interest in preventing drug use by all criminal-law-enforcement personnel, whether or not certain of such persons are ever involved in the fight against drug distribution. It might be thought that crime itself, like the law, is a seamless web. Still, I do not think *Von Raab* can be stretched that far, although I am by no means confident of that. I therefore concur in the majority's refusal to authorize drug testing of employees (like those in the Antitrust or Civil Rights Division) who are not responsible for drug-related criminal investigations and prosecutions.

II.

I disagree, however, with the majority's unwillingness to hold that drug warriors may be tested. What is characterized by the majority as judicial self-restraint, in my view, is really an impermissible exercise of judicial power: authorizing the continuance of an unlawful injunction without assuming the responsibility of justifying it. Refusing to decide the question presented, the majority purports to avoid reaching a constitutional issue. By allowing the injunction to continue, however, it has actually decided the question. Its position is not unlike permitting the execution of a prisoner while reserving the issue of whether capital punishment is constitutional. Perhaps the most important principle of judicial restraint governing the Anglo-American system is that judges are obliged to justify, in accordance with law, the exercise of—or the refusal to exercise—judicial power.

This case does not come to us on review of an agency regulation. Indeed, despite the majority's equating of

the drug-testing program with a regulation, it was announced in a policy statement issued by the Attorney General, which was not issued as a declaration or interpretation of law. Accordingly, we are not reviewing the policy statement against administrative-law challenges. Appellees do not argue, for instance, that the policy statement was not adopted in accordance with proper procedures, that it is arbitrary and capricious because over- or under-inclusive, or that it is outside the Attorney General's statutory authority. The statement is relevant only insofar as it manifests the undisputed intention of the Attorney General to test the named plaintiffs.[3] For pur-

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[3] I do not think the injunction was properly extended to other than named plaintiffs. It is generally thought that nonparties may benefit from the granting of an injunction only "if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). *See also Professional Ass'n of College Educators v. El Paso County Community College District*, 730 F.2d 258, 273-74 (5th Cir.), *cert. denied*, 469 U.S. 881 (1984); *Zepeda v. United States I.N.S.*, 753 F.2d 719, 728 n.1 (9th Cir. 1983); *id.* at 733-34 (dissenting opinion); *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 633-34 (9th Cir. 1972). *But see Soto-Lopez v. New York City Civil Service Comm'n*, 840 F.2d 162, 168-69 (2d Cir. 1988). And plaintiffs' claim is that they have a constitutional right not to be tested, not that they are somehow injured by the Department's testing of *other* employees. It is true, as the majority observes, Maj. op. at 24-25 n.23, that the government did not challenge the scope of the injunction on appeal on the grounds that it extended beyond named plaintiffs. In light of the district court's broad view that the program was unconstitutional as applied to any employee, however, one can understand the Attorney General's reluctance to perform testing of other than named plaintiffs until he gained a reversal of the district court's declaration of constitutional law. After *Von Raab* the situation is quite different.

Injunctions against the government are perfectly appropriate when necessary to prevent harm to specific individuals. But we ought not forget that an injunction is the most powerful civil order available to the judiciary and should not be used merely as a device to shape desirable administrative

poses of the lawsuit that intention could just as well have been demonstrated by a speech by the Attorney General. (The case would be ripe in that event because the threat to an arguable constitutional right would be undisputed). The majority's discussion of administrative-law principles is, therefore, quite irrelevant.[4] Its reliance on *SEC v. Chenery Corp.*, 318 U.S. 80 (1942), in particular, is totally misplaced. The *Chenery* doctrine—that a court reviewing an agency action will not entertain arguments not relied upon by the agency—is designed, as we have recently recognized, to prevent judicial usurpation of future agency adjudication or regulatory policymaking. *See Women Involved in Farm Economics*, slip op. at 10-12 (June 2, 1989) [hereinafter "*WIFE*"]. That concern is not implicated here.

The Attorney General's lawyers were entitled to make any arguments they wished in order to respond to the plaintiffs' challenge to the constitutionality of any application of his program. The Attorney General, for his part, never stated his reasons for believing his program constitutional when he announced it—nor was he obliged to do so by any law. *See WIFE*, slip op. at 10; *cf. Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1060 (5th Cir. 1985); *Holy Cross Hosp.-Mission Hills v. Heckler*, 749 F.2d 1340, 1346 (9th Cir. 1984). Of course, we rely on the government to explain its interest justifying the search involved in drug testing, but there is no legal barrier to that being done by the litigating lawyers. And although the argument the government presented in its

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action. "The District Court, exercising its equitable powers, is bound to give serious weight to the obviously disruptive effect which the grant of . . . relief . . . [i]s likely to have on the administrative process." *Sampson v. Murray*, 415 U.S. 61, 83 (1974).

[4] Even were this a case properly analyzed as an administrative-law challenge, the majority is in error, for the Administrative Procedure Act requires that "the reviewing court shall decide all relevant questions of law," 5 U.S.C. § 706, something the majority is unwilling to do.

post-*Von Raab* supplemental briefs sought to justify its entire program on the basis of, *inter alia*, the integrity rationale (not drawing a legal distinction between those engaged in drug prosecutions and those solely involved in prosecution of non-drug-related crimes), that litigating strategy is hardly surprising. It may even ultimately prevail. If we believe, as I do, that the government was partially correct, I see no legal grounds for our refusing to so acknowledge. The Supreme Court indicated in *Von Raab* that this is our responsibility: "it is appropriate to remand the case to the court of appeals for such proceedings as may be necessary to clarify the scope of th[e] category of employees subject to testing." 109 S. Ct. at 1397.

After oral argument, we dissolved the injunction as it related to presidential appointees and employees whose duties include storing, maintaining and safeguarding controlled substances, because no plaintiffs fell within those categories. Accordingly, plaintiffs did not have standing to challenge drug testing of those employees. In modifying the injunction, we recognized that the Attorney General's "program" was not an undifferentiated whole. We held the rest of the case in abeyance until the Supreme Court decided *Skinner* and *Von Raab*. Now we conclude that the injunction must be vacated as it applies to those who have top-secret clearance. Again, therefore, the majority necessarily acknowledges that we must dissolve the injunction insofar as it is unauthorized by law—whether or not we have been told that the Attorney General intends to implement his program to the extent that we permit. The injunction, in my view, must be further modified insofar as it prevents drug testing of those Justice Department employees who are engaged in the investigation and prosecution of drug cases. "[A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *United States v. Swift & Co.*, 286 U.S.

106, 114-15 (1932). Whether and how the Attorney General chooses to continue with the drug testing program—to the extent he legally can—is a policy matter for him to decide. But it is our responsibility to direct the district court to modify the injunction and thus to remove a judicial barrier which, in light of *Von Raab*, has proven to be improperly constructed. By so doing we would not even implicitly be suggesting that the Attorney General is *obliged* to test all employees that he may constitutionally test.

As I have explained, we are not reviewing the "plan" to determine whether it is arbitrarily over- or under-inclusive. I therefore understand neither the majority's suggestion that "DOJ, of course, remains free to promulgate new, narrower regulations," Maj. op. at 24, nor its statement that "agency reformulation of its policy . . . is the preferable next step," *id.* at 24. It would appear that the majority wishes the Attorney General to take an administrative action that he is under no legal obligation to perform: restructuring his program in accordance with a constitutional standard the majority is unwilling to define.[5] Furthermore, the majority suggests that the Attorney General's constitutional obligation is to draw the program's boundaries to encompass "federal prosecutors who could *plainly* be subjected to random testing." Maj. op. at 19 (emphasis added). Such a formulation implies that doubtful cases are to be resolved against the constitutionality of testing. I am aware of no legal authority that supports this proposition. That there may be close cases is all the more reason for the district court to follow governing law and consider those situations only insofar as *named plaintiffs* present them. *See supra* n.3.

* * * *

[5] I take the majority, however, to leave the question open to the sound judgment of the district judge. Maj. op. at 24.

The majority's opinion, at the very least, delays drug testing it is unwilling to declare unconstitutional. If the Executive Branch—presumably supported by Congress—is conducting a war against drugs, the majority's position, vis-a-vis the Executive Branch, strikes me as a form of judicial guerrilla warfare: placing a maximum number of impediments in the way of the Justice Department's program at minimum risk of Supreme Court review. With all due respect to my colleagues, I believe the approach they have adopted is an abuse of judicial power.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 88-1766

MARK B. HARMON, *et al.*,
Plaintiffs,

v.

EDWIN MEESE III, *et al.*,
Defendants.

[Filed July 29, 1988]

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss and for summary judgment.

Plaintiffs are forty-two employees of the Department of Justice who seek to enjoin implementation of the Department's "Drug Free Workplace Plan" in the Offices, Boards and Litigating Divisions of the Department. Under the plan, plaintiffs would be selected at random and ordered to produce urine specimens in order to permit the Department to ascertain whether they illegally use drugs. Plaintiffs contend that subjecting them to compulsory urinalyses without any suspicion of illegal drug use would violate their fourth amendment right to be free from unreasonable searches and seizures. Defendants, the Attorney General of the United States and the Assistant Attorney General for Administration, contend that the urinalyses to be conducted under the plan would constitute reasonable searches and therefore would not violate the fourth amendment.

The Department's drug testing program was created pursuant to Executive Order 12564, issued by President Reagan on September 15, 1986, which directed the head of each executive agency to develop plans to test all employees in "sensitive positions" for drug abuse in order to combat the "serious adverse effects [of drug use] upon a significant proportion of the national work force [which] results in billions of dollars of lost productivity each year." 51 Fed. Reg. 32,889. In accordance with this presidential directive, Attorney General Meese unveiled the "Department of Justice Drug-Free Workplace Plan" on September 25, 1987 (amended December 17, 1987) (the "DOJ Plan"), authorizing testing of, among others, all employees with less than one year's service ("probationary employees") holding sensitive positions and all employees in sensitive positions designated for drug testing ("testing designated positions or TDPs"). On December 15, 1987, defendants issued the Drug Free Workplace Plan (the "OBD Plan") of the Offices, Boards and Litigating Divisions of the Department of Justice. On June 27, 1988, defendants issued OBD Order 1792.1, giving notice of the implementation of the OBD Plan. All procedural hurdles have thus been cleared, and drug testing may commence in accordance with the OBD Plan as soon as August 26, 1988.

The OBD Plan calls for random testing of seven percent of all employees in testing designated positions, and mandatory testing of all probationary employees holding testing designated positions and all individuals tentatively selected for employment. The testing would seek evidence of use of marijuana, cocaine, opiates, amphetamines and phencyclidine. Employees would be selected for testing by neutral selection criteria, such as social security numbers. Disciplinary action would be initiated against any employee who tested positive or refused to be tested. Such disciplinary action could take various forms, including dismissal, suspension, removal from duty from a sensitive position, or reprimand. The employee would also be

referred to a rehabilitation program. After an employee has once been found to use illegal drugs, dismissal would be mandatory if that employee refused to obtain rehabilitation or tested positive for drug use a second time.

Testing designated positions are determined according to criteria enumerated in the DOJ Plan. The factors include the extent to which a DOJ component "[c]onsiders its mission inconsistent with illegal drug use" or "[m]ust foster public trust by preserving employee reputation for integrity, honesty and responsibility." DOJ Plan at 17. Also considered significant are whether in a particular position an employee carries firearms, deals with "sensitive" information, engages in law enforcement or in "activities affecting public health or safety"; is involved in the prosecution of criminal cases; or has access to grand jury proceedings. *Id.* at 17-18. The OBD Plan has designated for mandatory random testing all applicants tentatively selected for employment, all employees with top secret security clearances, all attorneys and support staff involved in conducting grand jury proceedings, all presidential appointees, all employees who prosecute criminal cases, and all employees whose duties include maintaining, storing or safeguarding controlled substances.

Appendix A to the OBD Plan lists testing designated positions within various OBD offices and the reasons why those positions within the particular office merit drug testing. Positions deemed "sensitive" and designated for testing include, for example, the chief, economists, financial analysts, mathematical statisticians, financial assistants, social science analysts, and secretaries within the Antitrust Division's Economic Litigation Section. A description of the incumbents' duties indicates that they "analyze and advise on all economic issues that arise in Division cases and investigations, merger reviews, regulatory agency proceedings, and legislative matters." The positions are designated for drug testing because:

> Impaired judgment and performance due to illegal drug use could result in a failure to consider adequately the economic implications of Division positions and actions, which could lead to higher prices, lower quality of goods and services, and lessened competitiveness of American businesses in world markets. Drug usage could also result in mishandling of Top Secret, grand jury, and other sensitive information, jeopardizing existing investigations and compromising both the integrity of the criminal enforcement process and national security.

OBD Plan, appendix A. Similar rationales are expressed for designating positions for drug testing within other sections of the Antitrust Division.

Similarly, trial attorneys in the Appellate Section of the Civil Rights Division are designated for drug testing because:

> Illegal drug use by incumbents could constitute a serious breach of public trust and could compromise decisions regarding litigation and legislation, resulting in a negative effect on the overall success of the program.

Id.

Employees selected for providing urine samples would be required to follow procedures that would be "as nonintrusive as possible." Memorandum of Law in Support of Defendants' Motion to Dismiss at 23. The employee who had been selected for random testing would report to a collection site. After showing photo identification, removing outer garments and washing hands, the employee would be directed to a rest room stall and required to produce a urine specimen of at least 60 milliliters. The employee would not be watched unless the collection monitor had reason to believe the employee might alter or substitute the specimen. After the sample had been taken, the collection monitor, in the presence of the em-

ployee, would transfer the sample to a bottle and measure its temperature to ascertain that the sample had not been altered or substituted. An identification label with the employee's fingerprint and identification number would be placed around the bottle. The employee would then sign a log book which in turn would be initialed by the collection monitor. Strict chain of custody procedures would be in place to ensure accuracy of the test results. The sample would be transported to a laboratory meeting strict quality control guidelines. Samples that initially tested positive under a Radio-Immuno-Assay test would be retested by the more exacting gas chromatography/ mass spectrometry technique, which is the most reliable indicator of the presence of drug metabolites in urine. The government concedes, however, that neither technique can measure current impairment, but rather can detect only whether the subject has used drugs relatively recently.

The Court agrees that drug abuse by federal employees is intolerable and that defendants' efforts to eradicate drugs from the federal workplace are well intentioned. It is the means defendants propose to achieve this laudable end that give the Court grounds for pause. Quite simply, the issue "is not *whether* drug use, off-duty or on-duty is incompatible with federal employment. Rather, the question is *by what means* it is permissible to come by evidence of such drug use." *American Federation of Government Employees v. Weinberger*, 651 F. Supp. 726, 735 (S.D. Ga. 1986) (emphasis in original).

Compulsory urinalysis of a public employee is a "search and seizure" because it infringes on a legitimate expectation of privacy. *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir. 1987); *National Federation of Federal Employees ("NFFE") v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *NFFE v. Carlucci*, 680 F. Supp. 416, 430 (D.D.C. 1988), *stayed pending appeal*, No. 88-5080 (D.C. Cir. Mar. 30, 1988); *American Federation of Gov't*

Employees v. Dole, 670 F. Supp. 445, 447 (D.D.C. 1987), *appeal docketed*, No. 87-5417 (D.C. Cir. Dec. 11, 1987). By its terms, the fourth amendment requires that governmental searches and seizures be reasonable. The reasonableness of a search depends upon the context in which it takes place. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). For example, to be reasonable, a public employer's search of his employee's desk and files need not be based upon a search warrant and probable cause, but requires "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct." *O'Connor v. Ortega*, 107 S.Ct. 1492, 1503 (1987). Determining whether a search is reasonable requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *NFFE v. Weinberger*, 818 F.2d at 942, *quoting O'Connor v. Ortega*, *supra*, 107 S.Ct. at 1499; *T.L.O.*, *supra*, 469 U.S. at 341. A search is reasonable if it "was justified at its inception" and if "the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 469 U.S. at 341.

In the context of public employer drug testing, a search is justified at its inception when " 'reasonable grounds [exist] for suspecting that the search will turn up evidence' of work-related drug use." *NFFE v. Weinberger*, *supra*, 818 F.2d at 943, *quoting T.L.O.*, 469 U.S. at 341. Defendants concede that illegal drug use is not a problem in the Department of Justice. Therefore, it is highly unlikely that compulsory random urinalysis drug testing of otherwise trusted and apparently law-abiding employees would turn up evidence of work-related drug use. Under the first prong of the test articulated by the Supreme Court and this Circuit, this Court concludes that the searches proposed in this case would not be justified at their inception.

Defendants, however, argue strenuously that compelling governmental interests justify the compulsory random urinalysis drug testing contemplated under their program. They contend that documentation of a "widespread" drug abuse problem among Department employees is not an absolute prerequisite to taking action to correct or stave off potential "disruption of the office and destruction of working relationships." Defendants' Memorandum at 56 (citing *Connick v. Myers*, 461 U.S. 138, 151-52 (1983) (upholding public employer's restrictions on assistant district attorney's right to comment on matters of primarily private concern which supervisor reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships in the office)). Defendants argue that the Department has "critical" interests in its employees' fitness for duty, in the security of sensitive and classified information, and in the integrity and public image of the Department. According to defendants, these compelling governmental interests justify the intrusion of compulsory random urinalysis drug testing upon plaintiffs' concededly legitimate expectation of privacy, especially given the fact that the drug problem in society at large has assumed "crisis" proportions.

Certainly, defendants have an interest in any illegal drug use by plaintiffs. However, something more than unfounded fears must justify an intrusive search. Even though a relaxed "reasonableness" standard applies to a search by the government as an employer, such a search must be for a noninvestigatory and work-related purpose. *O'Connor v. Ortega*, *supra*, 107 S.Ct. at 1503. Moreover, individualized suspicion is "usually a prerequisite to a constitutional search or seizure. . . . Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal." *T.L.O.*, *supra*, 469 U.S. at 342 n.8. Because "strong privacy interests are involved,"

Jones v. McKenzie, supra, 833 F.2d at 339, defendants must demonstrate a "compelling need of the government as employer [to] dispens[e] with the requirement." *NFFE v. Carlucci, supra*, 680 F. Supp. at 431. Even according considerable weight to the governmental interests identified as compelling does not help defendants, because there is no nexus between fitness for duty, security and integrity on the one hand, and compulsory random urinalysis drug testing on the other, where no drug problem is believed to exist.

An example of the required nexus is provided by *Jones v. McKenzie, supra*, in which the Court upheld compulsory drug testing as part of routine medical examinations of public employees involved in the transportation of young schoolchildren where such employees had repeatedly been involved in "incidents of bizarre or dangerous drug-related behavior, . . . syringes and bloody needles were found in restrooms used by Transportation Branch employees," and according to one estimate "60% of the employees assigned to the Transportation Branch [used] narcotics to some extent." 833 F.2d at 336. *Compare id. with Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1547 (6th Cir. 1988) ("[b]ecause there was not any evidence of a widespread or significant drug problem within the City of Chattanooga's Fire Department, the potential gains to society of initiating mandatory drug testing are significantly lower than would have been the case if there had been evidence of a systemic drug problem;" reasonableness of mandatory drug test of firefighters requires evidence either of significant department-wide drug problem or individualized suspicion).

This Circuit has held that compulsory urinalysis constitutes a significant infringement of plaintiffs' legitimate expectation of privacy. *Jones v. McKenzie, supra*, 833 F.2d at 339-340. For one thing, the highly controlled environment and the elaborate procedure designed for obtaining urine samples of an apparently law-abiding

employee outside the context of a routine medical examination may be considered offensive and demeaning. *See Railway Labor Executives' Ass'n* ("RLEA") *v. Burnley*, 839 F.2d 575, 586 (9th Cir. 1988) (urinalysis resembles intrusion posed by body cavity searches because offensive to human dignity and degrading), *cert. granted*, 56 U.S.L.W. 3831 (U.S. June 6, 1988); *AFGE v. Meese*, No. C-88-1419, slip op. at 10-11 (N.D. Cal. Jun. 16, 1988) ("[b]eing tapped during the work day and ordered to urinate into a container while under the close surveillance of a government representative, 'regardless of how professionally or courteously conducted, is likely to be a very embarrassing and humiliating experience' ") (*quoting Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D.N.J. 1986)). Moreover, other strong privacy interests are implicated in drug testing. "Because drug tests often furnish information about employee activities occurring outside of working hours, such tests may provide Government officials with a periscope through which they can peer into an individual's behavior in her private life, even in her own home." *Jones v. McKenzie*, *supra*, 833 F.2d at 339.

The government's first asserted interest—that of ensuring fitness for duty—is severely weakened by the fact that urinalysis does not measure an employee's current impairment. Where there is no relationship between what a search is expected to produce and the governmental interest asserted to support the search, the search cannot be justified. *E.g.*, *NFFE v. Carlucci*, *supra*, 680 F. Supp. at 433-34; *AFGE* v. *Meese*, *supra*, slip op. at 15; *RLEA v. Burnley*, *supra*, 839 F.2d at 588. Since compulsory random urinalysis drug testing of the Department's employees would not prove that an employee is currently impaired, the governmental interest in the fitness of its employees for duty is not greatly served by such drug testing.

This reasoning applies equally to the government's argument that compulsory random urinalysis drug testing would have a deterrent effect upon illegal drug use among Department employees. There is simply no nexus between what the search is expected to produce and the governmental interest. The defendants' justifications for testing incumbents within each section of the Offices, Boards and Divisions of the Department of Justice portray an alarming picture of what *could* happen if an incumbent abused drugs. Fortunately, defendants have "no reason to believe that drug use is widespread in the Department of Justice." Department of Justice Drug Testing Program: What You Need to Know at 9. Given that defendants do not consider drug abuse to be widespread within the Department, however, it is impossible to argue that mandatory random urinalysis drug testing serves the purpose of deterring illegal drug use by trusted and apparently law-abiding employees. In other words, defendants cannot claim a compelling governmental interest in deterring something that poses no threat and therefore does not need to be deterred.

The government also asserts a "critical" interest in the security of sensitive and classified information and in the "integrity" and "public image" of the Department. The Court agrees that these are important interests. Again, however, there is simply no nexus between what the search is aimed at uncovering and the asserted governmental interests. Given the absence of a drug problem at the Department, it is difficult to see how security of sensitive information, or the integrity and public image of the Department would be much served by requiring compulsory random urinalysis drug testing of trusted and apparently law-abiding employees, all of whom have passed rigorous background investigations into their character and integrity, and many of whom have received high awards for their distinguished public service.

Many other conceivable forms of misconduct by plaintiffs *could* be harmful to the compelling governmental interests defendants assert. For example, an employee might embezzle, obstruct justice, or accept bribes. Such acts would clearly harm the integrity and public image of the government, yet no one could seriously argue that, absent any grounds to suspect misconduct, defendants would be justified in tapping that employee's telephone, censoring his mail or searching his home.

Plaintiffs have shown a strong likelihood of success on the merits of their claim that compulsory random urinalysis drug testing as proposed in defendants' drug testing program is an unreasonable search and seizure that violates the fourth amendment. The balance of equities favors maintaining the status quo. Because the Court has concluded that compulsory random urinalysis drug testing of plaintiffs would violate the fourth amendment, plaintiffs would suffer harm if the injunction were not granted. Defendants have no urgent need to implement their program by August 26, 1988, and would, at most, be inconvenienced by postponement of the program should the Court ultimately rule in defendants' favor. Another reason for maintaining the status quo is that the Supreme Court has agreed to review two drug testing cases. *NTEU v. von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988); *RLEA v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *cert. denied*, 56 U.S.L.W. 3831 (U.S. June 7, 1988). The Supreme Court's decision in those cases will likely control the ultimate disposition of this case. Based upon what has been stated, the Court also concludes that the public interest is well served by preliminary injunction. In sum, all criteria for issuance of a preliminary injunction have been satisfied. *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Transmit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). The Court shall issue an

Order accordingly. Defendants' motion to dismiss and for summary judgment is DENIED.

/s/ George H. Revercomb
GEORGE H. REVERCOMB
Judge

July 29, 1988
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 88-1766

MARK B. HARMON, *et al.*,
Plaintiffs,

v.

EDWIN MEESE III, *et al.*,
Defendants.

[Filed July 29, 1988]

ORDER

In accordance with the Memorandum issued this 29th day of July, 1988, it is hereby

ORDERED, that plaintiffs' motion for a preliminary injunction is GRANTED. Until further order of this Court, defendants are enjoined from implementing mandatory random drug testing by urinalysis in the Offices, Boards and Litigating Divisions of the Department of Justice under the "Department of Justice Drug-Free Workplace Plan."

/s/ George H. Revercomb
GEORGE H. REVERCOMB
Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 88-1766

MARK B. HARMON, *et al.*,
Plaintiffs,

v.

EDWIN MEESE III, *et al.*,
Defendants.

[Filed July 29, 1988]

ORDER

Upon consideration of defendants' oral motion to make permanent the preliminary injunction issued by the Court this 29th day of July, 1988, and the lack of opposition thereto, it is hereby

ORDERED, that the motion is GRANTED, and that the preliminary injunction be made permanent.

/s/ George H. Revercomb
GEORGE H. REVERCOMB
Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 88-1766

MARK B. HARMON, *et al.*,
Plaintiffs,

v.

EDWIN MEESE III, *et al.*,
Defendants.

[Filed July 29, 1988]

ORDER

Upon consideration of defendants' motion to stay the preliminary injunction issued by the Court this 29th day of July, 1988, it is hereby

ORDERED, that the motion is DENIED for the reasons stated by the Court in its bench ruling.

/s/ George H. Revercomb
GEORGE H. REVERCOMB
Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-1766 (GHR)

MARK B. HARMON, *et al.*,
Plaintiffs,

v.

EDWIN MEESE III, Attorney General
of the United States, *et al.*,
Defendants.

DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given that the defendants in the above-captioned action appeal to the United States Court of Appeals for the District of Columbia Circuit from the district court's Order entered on July 29, 1988 granting a permanent injunction.

Respectfully submitted,

JOHN R. BOLTON
Assistant Attorney General

/s/ Robert J. Cynkar
ROBERT J. CYNKAR
Deputy Assistant Attorney
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/s/ Mary E. Goetten
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Attorneys for the Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 1988, the foregoing Defendants' Notice of Appeal was served by hand upon:

Stephen H. Sachs, Esq.
Carl Willner, Esq.
Stephen M. Cutler, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

/s/ Peter Robbins
PETER ROBBINS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

DATE: August 11, 1988

Dist. Ct. Civil No. 88-01766

U.S. Court Appeals No. 88-5265

RE: Harmon, Mark B., et al.
v. Meese, Edwin III, et al.

Copies of the notice of appeal and docket entries have been received from the District Court. The appeal has been docketed in this Court on this date pursuant to Federal Rule of Appellate Procedure 12(a). The appeal has been assigned the indicated docket number. All filings must contain this docket number as well as the signature of at least one member of the bar of *this* Court, a firm name, if applicable, and an address and telephone number.

Attached is a copy of an order entered this date. The order requires all parties to file certain documents within a specified time. Please read the order carefully.

Also, please read the other attachments carefully. They deal with recent revisions to the General Rules of this Court with which counsel may not be familiar.

Very truly yours,

CONSTANCE L. DUPRE
Clerk

By: /s/ Carmen A. Gooding
CARMEN A. GOODING
Deputy Clerk

Enclosures
Ltr 86-2
(August, 1987)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5265

MARK B. HARMON, *et al.*

v.

EDWIN MEESE, III, Attorney General
of the United States, *et al.*

[Filed Aug. 11, 1988]

ORDER

It appearing that this new case has been filed and docketed, it is

ORDERED that appellant(s) shall submit an original and three copies of the following documents on or before 09-12-88:

1. Docketing Statement and Appearance Form
2. Copy of the Decision of the District Court
3. Statement of the Issues to be Raised on Appeal
4. Certificate of Counsel (Gen. R. 11(a)(1))
5. A Report certifying that all necessary transcripts, if any, have been ordered, including the date when the transcript was ordered and a statement that satisfactory financial arrangements have been made with the Reporter. A copy of the Report shall be served on each Reporter.

It is FURTHER ORDERED that appellee(s) shall also submit a Certificate of Counsel pursuant to Gen. R. 11(a)(1), and an Entry of Appearance Form, within the same period.

It is FURTHER ORDERED that the parties shall file dispositive motions, if any, on or before 09-26-88. *See* Gen. R. (7)(i). Any procedural motion which would affect the calendaring of this case shall be filed on or before 09-12-88. The filing of the record on appeal and briefing are deferred pending further order.

It is FURTHER ORDERED that appellant shall file and serve a Final Report Concerning Transcripts within three (3) days of receipt of all transcripts ordered.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Fredriech A. Braun
FREDRIECH A. BRAUN
Deputy Clerk

Federal Register—Vol. 51, No. 180
Wednesday, September 17, 1986

PRESIDENTIAL DOCUMENTS

Executive Order 12564 of September 15, 1986

Drug-Free Federal Workplace

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater abstenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. *Drug-Free Workplace.*

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. *Agency Responsibilities*

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Sec. 3. *Drug Testing Programs.*

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the

nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Sec. 4. *Drug Procedures.*

(a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to sub-

mit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Sec. 5. *Personnel Actions.*

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, *provided that* such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal

drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agences shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitaiton through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Sec. 6. *Coordination of Agency Programs.*

(a) The Director of the Office of Personnel Management shall:

(1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;

(2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;

(3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;

(4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and

(5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory

authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

Sec. 7. *Definitions.*

(a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2101(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthi-

ness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).

(f) For purposes of this Order, the term "Employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

Sec. 8. *Effective Date.* This Order is effectively immediately.

/s/ Ronald Reagan

THE WHITE HOUSE,
September 15, 1986.

Editorial note: For the President's remarks of September 15 on signing EO 12564, see the *Weekly Compilation of Presidential Documents* (vol. 22, no. 38).

DEPARTMENT OF JUSTICE
DRUG-FREE WORKPLACE PLAN [1]

CERTIFIED

Dated: September 25, 1987

Amendments Approved: December 17, 1987

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[1] Amended pursuant to Inter-Agency Coordinating Group Requirements for Certification under Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987).

CHAPTER 1

GENERAL PROVISIONS

A. *Purpose*

This order:

a. Declares that the use of illegal drugs by all Department of Justice (DOJ) employees, on or off duty, will not be tolerated;

b. Establishes the DOJ Drug-Free Workplace Plan, required under Section 2(b) of Executive Order 12564, consistent with Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987), (hereafter cited as "the Act");

c. Sets forth objectives, policies and implementation guidelines for the DOJ Drug-Free Workplace Plan; and,

d. Provides procedures to govern implementation of the Plan including procedures to identify illegal drug users through drug testing on a controlled and carefully monitored basis.

B. *Background*

On September 15, 1986, the President signed Executive Order 12564, Drug-Free Federal Workplace, establishing a policy against the use of illegal drugs by Federal employees, whether on duty or off duty. In a letter to all executive branch employees dated October 4, 1986, the President, reiterated his goal of ensuring a safe and drug-free workplace for all federal workers.

The Executive Order recognized that illegal drug use is seriously impairing a portion of the national work force, resulting in the loss of billions of dollars each year. As the largest employer in the nation, the federal government has a compelling proprietary interest in establishing

reasonable conditions of employment. Prohibiting employee drug use is one such condition. The DOJ is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity. The intent of the policy is to offer a helping hand to those who need it, while sending a clear message that any illegal drug use is, quite simply, incompatible with federal service.

On July 11, 1987, Congress passed legislation affecting implementation of the Executive Order under Section 503 of the Act, in an attempt to establish consistency among federal agency drug testing plans, reliable and accurate drug testing, employee access to drug testing records, confidentiality of drug testing results, and continued, centralized oversight of the Federal Government's drug testing program. Although the Bureau of Prisons, Drug Enforcement Administration, Federal Bureau of Investigation, and Immigration and Naturalization Service are exempt from complying with this Act under § 503(b)(1)(D), the Offices, Boards, Litigating Divisions and U.S. Marshals are not exempt under that provision.

The DOJ, as a result of its law enforcement responsibilities, as well as the sensitive nature of its work, has an especially compelling obligation to eliminate illegal drug use from its workplace. Employees who work for an agency whose mission is to uphold and enforce the law, should not themselves violate the law.

The DOJ has a compelling interest, for example, in ensuring that employees of the Bureau of Prisons are drug-free in order to maintain a drug-free federal prison system.

Similarly, the Drug Enforcement Administration has a compelling interest in ensuring that its agents—who enforce drug interdiction laws—will themselves be drug-free.

Likewise, employees of the Federal Bureau of Investigation must foster public trust by earning and sustaining their reputation for integrity and honesty. Particularly in view of the FBI's law enforcement and national security responsibilities, illegal drug use is wholly incompatible with the FBI mission and purpose.

Equally significant, the United States Marshals Service is responsible for maintaining security and order in our nation's federal courts, as well as for protecting witnesses.

The Immigration and Naturalization Service has law enforcement responsibilties for controlling our nation's borders and apprehending and interdicting illegal drugs and criminal aliens as they enter the country.

Finally, attorneys with the DOJ hold positions of high public trust requiring them, as a condition of employment and as a measure of their position sensitivity, to pass full-field FBI background investigations before permanent offers of employment are extended. Moreover, they have access to classified and other sensitive information.

The mark of a successful drug-free workplace program depends on how well the Department can inform its employees of the hazards of drug use, and on how much assistance it can provide drug users. Equally important is the assurance to employees that personal dignity and privacy will be respected in reaching the Department's goal of a drug-free workplace. Therefore, this plan includes policies and procedures for: (1) employee assistance; (2) supervisory training; (3) employee education; and (4) identification of illegal drug use through drug testing on a carefully controlled and monitored basis.

C. *Nature, Frequency, and Type of Drug Testing to be Instituted*

Section 503 of the Act requires the DOJ Plan to specify the nature, frequency, and type of drug testing to be instituted. The DOJ Plan includes the following types of

drug testing: (1) Applicant testing; (2) Random testing of sensitive employees in testing designated positions; (3) Reasonable suspicion testing; (4) Accident or unsafe practice testing; (5) Voluntary testing; and (6) Testing as part of or as a follow-up to counseling or rehabilitation.

The frequency of testing for random testing, voluntary testing, and follow-up testing is specified in each non-exempt Component Plan. The Attorney General reserves the right to increase or decrease the frequency of testing based on the Department's mission, availability of resources, and experience in the program, consistent with the duty to achieve a drug free workplace under the Executive Order.

D. *Drugs for Which Individuals Are Tested*

Section 503 of the Act requires the Offices Boards and Litigating Divisions (hereafter "OBDs") and the U.S. Marshals Service (hereafter "USMS") to specify the drugs for which individuals in the OBDs and USMS shall be tested. These are listed in these Component Plans.

E. *Scope*

This order shall be effective for the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Prisons and the Immigration and Naturalization Service immediately. These DOJ components shall ensure that their drug testing programs implemented under this order comply with the mandatory guidelines published under § 503(a)(1)(A)(ii) of the Act, no later than 90 days after such mandatory guidelines take effect, except that any judicial challenge that affects such guidelines should not affect drug testing programs or plans subject to this paragraph.

When each Executive Branch agency as specified in Section 503(a)(2) of the Act has complied with the pro-

visions of Section 503(a) of the Act, this order shall be effective immediately for all other components of the Department, including each the OBD Office, Board and Division as defined in Chapter 1.H.3 of this order.

F. *Union Cooperation*

The active participation and support of labor organizations can contribute to the success of this program. Components shall seek ways in which recognized bargaining units representatives might assist in program implementation, such as in acquainting employees with rehabilitation facilities and by enhancing employee confidence in the program. Components shall continue to observe agreements already reached, include union representatives in general orientation programs, and continue to meet all obligations under Title VII of the Civil Service Reform Act of 1978.

G. *Supervisory Training*

Training will be provided for supervisors to assist in identifying and addressing illegal drug use by employees. Training may be accomplished through various means, including contracting out to private organizations, HHS courses, in-house training courses, and employee assistance program training in cooperation with designated EAP Administrators in the FBI, BOP, DEA, INS, U.S. Marshals and Justice Management Division, or other designated individual(s). Training will include information regarding referral of employees to the EAP, procedures and requirements for drug testing and signs of possible drug use. Such training will also include information to make supervisors more sensitive to employee drug behavior and help supervisors recognize and document facts that give rise to a reasonable suspicion that an employee may be using illegal drugs.

H. *Definitions*

1. Terms. Wherever appropriate, terms used are the same as terms used in the FPM Letter 792-16 and in the *HHS Guidelines.*

2. Component Heads refers to the following organizational heads:

Director, Federal Bureau of Investigation;

Administrator, Drug Enforcement Administration;

Director, Bureau of Prisons;

Commissioner, Immigration and Naturalization Service;

Director, United States Marshals Service; and

Assistant Attorney General for Administration (for all offices, boards and divisions).

3. Offices, Boards, and Divisions as used in this order refers to the organizations listed under those titles in 28 C.F.R. 0.1, including the U.S. Attorneys' offices, together with any DOJ organizations not part of INS, DEA, FBI, USMS or BOP.

4. Illegal Drugs means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

5. Management Official means an individual employed by DOJ in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of DOJ. 5 U.S.C. § 7103(a)(11).

6. Medical Review Official means the individual responsible for receiving laboratory results generated from the

DOJ Drug-Free Workplace Program who is a licensed physician with knowledge of substance abuse disorders and the appropriate medical training to interpret and evaluate all positive test results together with an individual's medical history and any other relevant biomedical information.

7. Random Testing means mandatory testing imposed without individualized suspicion that a particular individual is using illegal drugs. Random testing includes either uniform-unannounced testing of every employee occupying a testing designated position or a statistically random sampling of individuals occupying testing designated positions based on a neutral criterion, such as social security numbers.

8. Employees in Sensitive Positions means: (1) employees in positions designated by the Component head as Special Sensitive, Critical Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual, or employees in positions designated by the Component Head as sensitive in accordance with Executive Order No. 10450, as amended; (2) employees granted access to classified information pursuant to a determination of trustworthiness by the Attorney General under Section 4 of Executive Order No. 12356; (3) individuals serving under Presidential appointments; (4) law enforcement officers as defined in 5 U.S.C. § 8331(20), and 8401(17); or (5) Other positions that the Attorney General determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

9. Supervisor means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such

action, if the exercise of the authority is not merely routine or clerical in nature, but requires the consistent exercise of independent judgment. 5 U.S.C. § 7103(a)(10).

10. Testing Designated Positions means position which have been designated for random testing pursuant to the procedures in Chapter 4.B of this Order. Employees occupying "sensitive" positions additionally must be designated as occupying "testing designated positions" before random testing of their position may commerce.

11. Verified Positive Test Result means a test result that has been screened positive by an FDA-approved immunoassay test, confirmed by a Gas Chromatography/Mass Spectrometry assay, (or other mfirmatory tests approved by HHS), evaluated by the Medical Review Official and determined by him to be unjustified under Section 6.E. of this order.

J. *References*

1. Authorities

   a. Executive Order 12564;

   b. Executive Order 10450;

   c. Executive Order 12356;

   d. Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987);

   e. Scientific and Technical Guidelines For Drug Testing Programs, Alcohol, Drug Abuse and Mental Health Administration (ADAMHA), Department of Health and Human Services (HHS), as amended;

   f. Standards for Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies, Alcohol, Drug Abuse and Mental

Health Administration (ADAMHA), Department of Health and Human Services (HHS), as amended;

g. Civil Service Reform Act of 1978, P.L. 95-454;

h. 42 CFR Part 2, establishing requirements for assuring the confidentiality of alcohol and drug-abuse patient treatment records;

i. The Privacy Act of 1974 (5 U.S.C. Section 552a), prescribing requirements governing the maintenance of records by agencies pertaining to the individuals and access to these records by the individual(s) to whom they pertain;

j. 49 CFR Part 10, implementing the Privacy Act of 1974 within the DOJ;

k. Federal Employees Substance Abuse Education and Treatment Act of 1986, P.L. 99-570.

2. Guidance

a. Office of Personnel Management (OPM), Federal Personnel Manual (FPM) Letters 792-16 (November 28, 1986), and 792-17 (March 9, 1987), setting forth guidelines for Federal civilian agencies in establishing a drug-free workplace pursuant to Executive Order 12564;

b. FPM Chapter 792, Federal Health and Counseling Programs, providing guidance to Federal agencies in establishing alcoholism and drug abuse programs (subchapter 5) and employee counseling services programs (subchapter 6) for Federal employees with alcohol or drug problems;

c. FPM Supplement, Chapter 792-2, providing guidance for developing and maintaining appropriate prevention, treatment and rehabili-

tation programs and services for alcoholism and drug abuse among Federal employees; and

d. DOJ Order 1792.1, May 15, 1978, and related authorities.

CHAPTER 2. NOTICE

A. *General Notice*

Section 4(a) of the Executive Order requires agencies to notify all employees of the testing program. The Attorney General has authorized each Component Head to issue a general notice to all employees within each respective component announcing the testing program of that component. Component Heads of the BOP, DEA, FBI, and INS, shall ensure that the general notices are provided to all their employees no later than sixty (60) days prior to the implementation date of a component plan. All other Component Heads shall provide general notices to their respective employees upon completion of the congressional certification procedures pursuant to §§ 503(a)(1)(A), 503(a)(1)(B), and 503(a)(1)(C) of the Act. Each notice shall:

a. Explain briefly the purpose of the Drug-Free Workplace Plan;

b. Notify all employees within the Component that the Drug-Free Workplace Plan will include both voluntary and mandatory testing;

c. Notify employees that those who hold positions selected for random testing will also receive an individual notice, prior to the comencement of testing, indicating that their position has been designated a "test designated position."

d. Inform employees that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through

Employee Assistance Program Administrators (EAP's) available to Component employees;

B. *Individual Notice*

Once designated by the Component Head pursuant to the procedures in Chapter 4.B of this Order, Component Heads shall distribute individual notices to those employees in a sensitive position designated for random testing in the Component prior to the commencement of such testing. The notice will:

a. Notify specific Component employees that their position has been designated a "test designated position;"

b. Explain briefly the purpose of the Drug-Free Workplace Plan;

c. Describe the circumstances under which testing may occur;

d. Indicate that positive test results verified by the Medical Review Officer will be protected under the provisions of the Privacy Act, 5 U.S.C. § 552a and for non-exempt Components, under § 503(e) of the Act, and that medical and rehabilitation records will be deemed confidential "patient" records that will be disclosed only in accordance with the prior written consent of the patient with respect to whom such record is maintained;

e. Indicate that the confirmatory test is highly reliable and difficult to dispute;

f. State the consequences of both confirmed positive test results and refusal to be tested;

g. Indicate that opportunity will be afforded to submit medical documentation of lawful use of an otherwise illegal drug;

h. Indicate that opportunity will be afforded the employee voluntarily to identify himself as a user of illegal drugs and to receive counseling or re-

habilitation, in which case disciplinary action is not required;

i. Announce that employees may seek counseling and rehabilitation and inform them of the procedure for obtaining such assistance through specified Employee Assistance Programs (EAP's), available to Component employees;

C. *Signed Acknowledgement*

Each employee in a testing designated position will be asked to acknowledge in writing that the employee has received and read the notice that the employee's position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal. Each notice will be signed by the employee and centrally collected for easy retrieval by the Component Head.

If the employee refuses to sign the acknowledgement, the employee's supervisor shall note on the acknowledgement form that the employee received the notice. This acknowledgement is advisory only. An employee's failure to sign the notice shall not preclude testing that employee, or otherwise affect the implementation of this order since the general sixty-day notice will previously have notified all DOJ employees of the requirement to be drug-free.

Notwithstanding any other provision in this DOJ Drug-Free Workplace Plan, the FBI is not required to issue general or individual notices to FBI employees who remain subject to the FBI drug testing program promulgated before September 15, 1986. However, all Component Heads, including the FBI shall provide every new DOJ employee as part of the regular personnel orientation program notice of the DOJ Drug-Free Workplace Plan.

D. *Administrative Relief*

If an employee believes his or her position has been wrongly classified a testing designated position (TDP), that employee may file an administrative appeal to the designated DOJ official who has authority to remove the employee from the TDP list. The appeal must be submitted by the employee, in writing, to the designated official within 15 days of notification, setting forth all relevant information. The designated official shall review the appeal based upon the criteria applied in designating that employee's position as a TDP. The official's decision is final and is not subject to further review.

CHAPTER 3. PROGRAM ADMINISTRATION

A. *Component Heads*

Component Heads are responsible for the implementation of the Drug-Free Workplace Plan within their component and for adherence to all requirements of Executive Order 12564 and § 503 of the Act. Each Component Head will assure that the following aspects of the Drug-Free Workplace Plan are efficiently and effectively accomplished in accordance with this order and all other applicable regulations.

B. *Field Implementation*

Each Component shall develop implementation procedures to enable DOJ field offices efficiently and swiftly to implement all aspects of this order, taking into account the unique geographical, personnel, budgetary and other relevant factors of the field offices.

Such procedures shall permit field office implementation to proceed independently of headquarters implementation. Testing may proceed under this order as soon as any field office or operating site is prepared to commence testing, and without regard to whether any other field

office or operating site or headquarters is prepared to commence testing.

Such procedures shall also encourage cooperation and coordination among components so as to conserve resources and efficiently implement this order.

C. *Drug Program Coordinator*

Each Component shall have a Drug Program Coordinator (DPC) assigned to carry out the purposes of this plan. The DPC shall be responsible for implementing, directing, administering, and managing the drug program within the Component. The DPC shall serve as the principal contact with the laboratory in assuring the effective operation of the testing portion of the program. In carrying out this responsibility, the DPC shall, among other duties:

1. Arrange for all testing authorized under this order;
2. Insure that all employees subject to random testing receive individual notice as described in Section 1(H) of this Plan; prior to implementation of the program, and that such employees return a signed acknowledgement of receipt form;
3. Document, through written inspection reports, all results of laboratory inspections conducted;
4. Coordinate with and report to the Component Head on DPC activities and findings that may affect the reliability or accuracy of laboratory results;
5. Ensure that the means of random selection in the random testing program remains confidential;
6. Evaluate periodically whether the numbers of employees tested and the frequency with which those tests will be administered satisfy DOJ's duty to achieve a drug-free work force;

7. In coordination with the EAP Administrator, publicize and disseminate drug program educational materials, and oversee training and education sessions regarding drug use and rehabilitation; and

8. Coordinate all DPC duties in field offices whereever possible to conserve resources and to efficiently and speedily accomplish reliable and accurate testing objectives.

D. *Procurement and Contract Administration*

Wherever existing facilities are inadequate to implement this order, the Component head shall:

1. Act as Contracting Officer for the administration of all related contracts;

2. Ensure that contractors chosen to perform the drug screening tests are duly certified pursuant to the HHS guidelines and that all contracts conform to the technical specifications of the HHS guidelines; and

3. Establish, by contract or with DOJ employees as deemed appropriate, the positions and specific responsibilities of the DPC and the MRO as required by the HHS guidelines.

E. *Medical Review Official*

Each Component shall have an MRO assigned to carry out the purpose of this Order. The MRO shall, among other duties:

1. Receive all laboratory test results;

2. Assure that an individual who has tested positive has been afforded an opportunity to justify the test result in accordance with Chapter 4.I of this Plan;

3. Consistent with confidentiality requirements, refer written determinations regarding all verified positive test results to the appropriate component official, including a positive drug test result form indicating that the positive result is "unjustified," together with all relevant documentation and a summary of findings;

4. Confirm with the appropriate personnel official whether an individual who has been tentatively selected for employment with the DOJ has obtained a verified positive test result;

5. Coordinate with and report to the Component Head on all activities and findings on a regular basis;

6. Coordinate all DPC duties in field offices wherever possible to conserve resources and to efficiently and speedily accomplish reliable and accurate testing objectives.

F. *Employee Assistance Program Administrator*

The FBI, DEA, BOP, INS, U.S. Marshals and Justice Management Division each have existing Employee Assistance Program Administrators. Among other duties, each Component's EAP shall:

(1) Provide counseling-referral and treatment-referral services to employees referred by themselves or through administrative channels for illegal drug use and monitor their prograss after rehabilitation;

(2) Conferring with the Component Head, the MRO and the employee's supervisors, as appropriate;

(3) Provide educational materials and training to managers, supervisors, and employees on illegal drugs in the workplace, including training on reasonable suspicion testing;

(4) Assist supervisors with performance and/or personnel problems that may be related to illegal drug use;

(5) Ensure that EAP is not involved in the collection of urine samples or the initial reporting of test results; and

(6) Ensure that confidentiality of test results and related medical treatment and rehabilitation records is maintained in accordance with Chapter 5 of this order.

G. *Supervisors*

Supervisors will be trained to recognize and address illegal drug use by employees, and will be provided information regarding referral of employees to the EAP, procedures and requirements for drug testing, and behavioral patterns that give rise to a reasonable suspicion that an employee may be using illegal drugs. Except as modified by the Component Head to suit specific program responsibilities, first-line supervisors shall:

1. Attend training sessions on illegal drug-use in the workplace;

2. Initiate a reasonable suspicion test, after first making appropriate factual observations and documenting those observations and obtaining approval from the second-line supervisor;

3. Refer employees to the EAP for assistance in obtaining counseling and rehabilitation, upon a finding of illegal drug use;

4. Initiate appropriate disciplinary action upon a finding of illegal drug use; and

5. In conjunction with personnel specialists, assist higher-level supervisors and the EAP Administrator in evaluating employee performance and or

personnel problems that may be related to illegal drug use.

A higher-level supervisor shall review and concur, in advance, with all reasonable suspicion tests ordered under his or her supervision.

H. *Disciplinary Proposing and Deciding Officials*

Disciplinary Proposing and Deciding Officials are responsible for:

1. Receiving all relevant evidence regarding verified positive test results; and
2. Taking appropriate disciplinary action consistent with the Executive Order and with DOJ order 1752.1A, "Discipline and Adverse Actions."

CHAPTER 4

IMPLEMENTATION REQUIREMENTS

A. *Selection of Individuals for Drug Screening Testing*

Upon the appropriate effective date of implementation, individuals may be selected for testing in the following categories:

1. Random Testing. Any sensitive DOJ employee who holds a testing designated position is subject to random testing. In addition to being subject to random testing, any probationary employee in a sensitive position may be directed to take a drug test during probation before an offer of permanent employment will be extended.
2. Voluntary Testing. Employees not in testing designated positions may volunteer for unannounced random testing by notifying the DPC. These employees will then be included in the pool of testing designated positions subject to random

testing, and be subject to the same conditions and procedures applicable to random testing. Volunteers shall remain in the TDP pool for the duration of the position which the employee holds, or until the employee withdraws from participation by notifying the DPC.

3. Reasonable Suspicion Testing. Reasonable suspicion testing may be based upon, among other things:

   (1) Observable phenomena, such as direct observation of drug use or possession and/or the physical symptoms of being under the influence of a drug;

   (2) A pattern of abnormal conduct or erratic behavior;

   (3) Arrest or conviction for a drug-related offense; or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking;

   (4) Information provided either by reliable and credible sources or independently corroborated; or

   (5) Evidence that the employee has tampered with a previous drug test.

Although reasonable suspicion testing does not require certainty, mere "hunches" are not sufficient to meet this standard.

4. Accident or Unsafe Practice Testing. Any employee involved in an accident or unsafe practice while on duty may be directed to take a drug test as part of an authorized examination into the accident or unsafe practice, and pursuant to criteria established by the Component Head.

5. Follow-up Testing. All employees referred through administrative channels who undergo counseling or rehabilitation programs for illegal drug use

testing, and be subject to the same conditions and procedures applicable to random testing. Volunteers shall remain in the TDP pool for the duration of the position which the employee holds, or until the employee withdraws from participation by notifying the DPC.

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5. Follow-up Testing. All employees referred through administrative channels who undergo counseling or rehabilitation programs for illegal drug use

will be subject to unannounced testing following completion of such a program for a period of one year. Such employees shall be tested at the amount stipulated in the abeyance contract, or, in the alternative, at a uniform increased frequency set by the Component Head. Such testing is distinct from testing which may be imposed as a component of EAP.

6. Applicant Testing. Drug testing is required for all individuals who are tentatively selected for DOJ employment at the commencement of authorized testing. Individuals seeking appointments to other sensitive DOJ positions may also be subjected to applicant testing. Upon the commencement of authorized testing, each Component Head shall ensure:

   (a) That every DOJ vacancy announcement shall contain the following announcement: "All applicants for this position will be required to submit to urinalysis to screen for illegal drug use prior to appointment;" although failure of the announcement to contain this notice will not preclude testing if advance written notice is provided applicants in some other fashion;

   (b) That each individual who is tentatively se-selected for a position will be notified that appointment to the position will be contingent upon the receipt of a negative drug test result; and

   (3) That applicants to be tested shall be directed to an appropriate collection facility, and tested as soon after notification as possible, but no less than within 48 hours of notice. Where appropriate, applicants may be re-reimbursed for reasonable travel expenses.

B. *Designating the Testing Designated Position*

The Executive Order requires random testing for employees in sensitive positions that have been designated as testing designated positions. Each Component Head additionally must determine which Component employees in sensitive positions occupy a testing designated position that will be randomly tested. Except for the BOP, DEA, FBI, and INS, each Component Head must specify the criteria and procedures to be applied in designating positions for drug testing, including the justification for such criteria and procedures as required under Section 503 of the Act. A position will be deemed "testing designated" when the Attorney General approves either:

1. A written Component Plan submitted by the Component Head, which Plan lists or otherwise describes the testing designated positions;
2. A specific position or positions submitted by the Component Head after the submission of that Component Head's initial Plan.

Among the factors the Component Head shall consider in determining a testing designated position, are the extent to which the Component—

1. Considers its mission inconsistent with illegal drug use;
2. Is engaged in law enforcement;
3. Must foster public trust by preserving employee reputation for integrity, honesty and responsibility;
4. Has national security responsibilities;
5. Has drug interdiction responsibilities; or

The extent to which the position considered—

1. Authorizes employees to carry firearms;
2. Gives employees access to sensitive information;

3. Authorizes employees to engage in law enforcement;
4. Requires employees, as a condition of employment, to obtain a security clearance;
5. Requires employees to engage in activities affecting public health or safety;
6. Involves the prosecution of criminal cases;
7. Includes access to a controlled substance as defined by Section 802(6) of Title 21 of the United States Code; or
8. Involves the conduct of or access to grand jury proceedings.

The Attorney General reserves the right to add or delete positions determined to be testing designated positions pursuant to the criteria established in the Executive Order and this Plan. Moreover, pursuant to 42 U.S.C. 290ee-1(b)(2), and the pertinent provisions of the Federal Personnel Manual, the Attorney General has determined that all positions which have been or will be designated as testing designated positions under this plan are "sensitive positions," and are therefore exempted from coverage under 42 U.S.C. 290ee-1(b)(1) for Federal civilian employment or a Federal professional or other license or right solely on the basis of prior drug abuse.

C. *Notification of Selection*

Notification to employees of selection for random testing will be pursuant to procedures designed to:

1. Ensure that employees will not have premature notice that they have been randomly selected to be tested;
2. Allow for prompt rescheduling of employees randomly selected, but who obtain a legitimate deferral.

In any event, notification will occur the same day, preferably within two hours, of the scheduled testing.

D. *Deferral of Testing*

An employee selected for random drug testing may obtain a deferral of testing if the employee's first-line and second-line supervisors concur that a compelling need necessitates a deferral on the grounds that the employee is:

1. In a leave status (sick, annual, administrative or leave without pay);
2. In official travel status away from the test site or is about to embark on official travel scheduled prior to testing notification;

An employee whose random drug test is deferred will be subject to an unannounced test within the following 60 days.

E. *Failure to Appear for Testing.*

Failure to appear for testing without a deferral will be considered refusal to participate in testing, and will subject an employee to the range of disciplinary actions, including dismissal, and an applicant to the cancellation of an offer of employment. Employees will be advised of the possibility that disciplinary action will occur if they refuse to participate in the testing. If an employee fails to appear at the collection site at the assigned time, the collector shall contact the DPC to obtain guidance on action to be taken.

F. *Notice to Employees Tested Under Specific Conditions*

Employees tested pursuant to reasonable suspicion testing, accident or unsafe practice testing, or follow-up testing, must receive notice that they will be tested and the reason for such testing. Notification will occur the same day, preferably within two hours, of the scheduled testing.

G. *Technical Guidelines for Drug Testing*

The DOJ will adhere to all scientific and technical guidelines for drug testing programs promulgated by HHS consistent with the authority granted by E.O. 12564 and with the provisions of § 503 of the Act. To the extent that any of the procedures specified in this section are inconsistent with any of those specified in the Scientific and Technical Guidelines promulgated by the Department of Health and Human Services, or any subsequent amendment thereto, such HHS Guidelines or amendment shall supersede the procedures specified in this section, but only to the extent of the inconsistency.

H. *Privacy in Drug Testing*

The employee or applicant to be tested will provide his or her sample in a rest room stall or similar enclosure so that the employee is not being observed while providing the sample. Observation is permitted, however, when there is reason to believe a particular individual may alter or substitute the specimen provided. Reasons to believe a person may alter or substitute the specimen include, but are not limited to:

1. The individual is being tested pursuant to Chapter 4.A.3, relating to reasonable suspicion testing;
2. The individual has previously been found by the EPA to be an illegal drug user;
3. The individual has previously tampered with a sample;
4. Facts and circumstances suggest that the individual—
    a. is an illegal drug user;
    b. is under the influence of drugs at the time of the test; or
    c. has equipment or implements capable of tampering or altering urine samples.

I. *Opportunity to Justify a Positive Test Result*

1. When a confirmed positive result has been returned by the laboratory, the MRO shall perform the duties set forth in the HHS Guidelines. For example, the MRO may choose to conduct employee medical interviews, review employee medical history, or review any other relevant biomedical factors. The MRO must review all medical records made available by the tested employee when a confirmed positive test could have resulted from legally prescribed medication.

   Evidence to justify a positive result may include, but is not limited to:

   (a) A valid prescription.

   (b) An affidavit from the employee's physician verifying a valid prescription.

2. Individuals are not entitled, however, to present evidence to the MRO in a trial-type administrative proceeding, although the MRO has the discretion to accept evidence in any manner the MRO deems most efficient or necessary.

3. If the MRO determines there is no justification for the positive result, such result will then be considered a verified positive test result. The MRO shall immediately contact the EAP Administrator upon obtaining a verified positive test result.

J. *Refusal to Take Drug Test When Required*

1. An employee who refuses to be tested when so required will be subject to the full range of disciplinary action, including dismissal.

2. No applicant who refuses to be tested shall be extended an offer of employment.

3. Attempts to alter or substitute the specimen provided will be deemed a refusal to take the drug test when required.

K. *Finding of Drug Use and Disciplinary Consequences*

1. Drug Use Determination. An employee may be found to use illegal drugs on the basis of any appropriate evidence including, but not limited to:

   (a) Direct observation;

   (b) Evidence obtained from an arrest or criminal conviction;

   (c) A verified positive test result; or

   (d) An employee's voluntary admission.

2. Employees in Sensitive Positions. DOJ shall not allow an employee to remain on duty in a sensitive position after being found to use illegal drugs, prior to successful completion of rehabilitation through an EAP. However, as part of an EAP, the Component Head may, in his discretion, allow an employee to return ot duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or national security.

3. Range of Consequences. DOJ shall initiate action to discipline any employee who is found to use illegal drugs except that DOJ is not required to initiate any disciplinary action against an employe who voluntarily identifies himself as a user of illegal drugs prior to being identified through other means, obtains counseling or rehabilitation, and thereafter refrains from using illegal drugs. such disciplinary action, consistent with the requirements of the Civil Service Refrom Act and other statutes and regulations, may include any

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3. Range of Consequences. DOJ shall initiate action to discipline any employee who is found to use illegal drugs except that DOJ is not required to initiate any disciplinary action against an employe who voluntarily identifies himself as a user of illegal drugs prior to being identified through other means, obtains counseling or rehabilitation, and thereafter refrains from using illegal drugs. such disciplinary action, consistent with the requirements of the Civil Service Refrom Act and other statutes and regulations, may include any

of the following measures, but some disciplinary action must be initiated:

(a) Reprimanding the employee in writing;

(b) Placing the employee in an enforced leave status, if the employee so requests;

(c) Suspending the employee for fourteen days or less;

(d) Suspending the employee for 15 days or more;

(e) Suspending the employee until such time as he or she successfully completes counseling or rehabilitation or until the Department determines that action other than suspension is more appropriate;

(f) Removing the employee from the service.

DOJ shall refer an employee found to use illegal drugs to an EAP. Such referral, however, does not preclude initiation of disciplinary proceedings.

4. Initiation of Mandatory Removal From Service. The DOJ shall initiate action to remove an employee for:

a. Refusing to obtain counseling or rehabilitation through an Employee Assistance Programs as required by the Executive Order after having been found to use illegal drugs;

b. Having been found not to have refrained from illegal drug use after a first finding of illegal drug use.

5. Voluntary Referral.

(a) Under Executive Order 12564, the DOJ is required to initiate action to discipline any employee found to use illegal drugs in every

circumstance except one. If an employee (1) voluntarily admits his or her drug use; (2) completes counseling or an EAP; and (3) and thereafter refrains from drug use, such discipline "is not required."

(b) The decision whether to discipline a voluntary referral will be made by the Component Head on a case-by-case basis depending upon the facts and circumstances. Although an absolute bar to discipline cannot be provided for certain positions because of their extreme sensitivity, the DOJ, in determining whether to discipline, shall consider that the employee has come forward voluntarily.

(c) Moreover, in coming forward, and consistent with Chapter 4.A.2, an employee may volunteer for a drug test as a means of self-identification. Although this self-identification test may yield a verified positive test result, such test result shall merely constitute an identification for purposes of this Section.

L. Employee Counseling and Assistance

1. DOJ shall continue its sponsorship of an EAP program which includes programs for referrals drug abuse prevention and treatment and for the rehabilitation of employees with drug use problems.

2. While participating in a counseling or rehabilitation program, and at the request of the program, the employee may be exempted from the random testing designated position pool for a period not to exceed sixty days, or for a time period specified in an abeyance contract or rehabilitation plan approved by the Component Head. Upon completion of the program, the employee immediately

shall be subject to follow-up testing pursuant to Chapter 4.A.5.

CHAPTER 5. RECORDS AND REPORTS

A. *Confidentiality of Test Results*

The laboratory may disclose confirmed laboratory test results only to the MRO or the staff of the MRO. Any positive result which the MRO justifies by licit and appropriate medical or scientific documentation to account for the result as other than the intentional ingestion of an illegal drug will be treated as a negative test result and may not be released for purposes of identifying illegal drug use. Test Results will be protected under the provisions of the Privacy Act, 5 U.S.C. § 552a, et seq. Additionally, for the OBDs and USMS, test results will be protected under Section 503(e) of the Act, and may not be released in violation thereof. The MRO or the staff of the MRO may maintain only those records necessary for compliance with this order. Any records of the MRO, including drug test results, may be released to any supervisor or management official for purposes of auditing the activities of the MRO, except that the disclosure of the results of any audit may not include personal identifying information on any employee.

In order to comply with Section 503(e) of the Act, the results of a drug test of a DOJ employee may not be disclosed without the prior written consent of such employee, unless the disclosure would be—

1. To the MRO;
2. To the EAP Administrator in which the employee is receiving counseling or treatment or is otherwise participating;
3. To any supervisory or management official within the DOJ having authority to take adverse personnel action against such employee; or

4. Pursuant to the order of a court of competent jurisdiction or where required by the United States Government to defend against any challenge against any adverse personnel action.

For purposes of this Section, "management official" includes any management or government official whose duties necessitate review of the test results in order to process adverse personnel action against the employee. In addition, test results with all identifying information removed shall also be made available to DOJ personnel, including the DPC, for data collection and other activities necessary to comply with Section 503(f) of the Act.

B. *Test Results*

Any employees who are the subject of a drug test under this order shall, upon written request, have access to:

1. Any records relating to such employee's drug test; and

2. Any records relating to the results of any relevant certification, review, or revocation-of-certification proceedings, as referred to § 503(a)(1)(A)(iii)(III) of the Act.

Except as authorized by law, an applicant who is the subject of a drug test, however, shall not be entitled to this information.

C. *Confidentiality of Records in General*

All drug testing information specifically relating to individuals is confidential and should be treated as such by anyone authorized to review or compile program records. In order to efficiently implement this order and to make information readily retrievable, the DPC shall maintain all records relating to reasonable suspicion testing, suspicion of tampering evidence, and any other authorized documentation necessary to implement this order.

All records and information of the personnel actions taken on employees with verified positive test results should—where appropriate—be forwarded to the Labor Management Relations Section. Such records shall remain confidential, locked in a combination safe, with only authorized individuals who have a "need-to-know" having access to them.

D. *Employment Assistance Program Records*

The EAP Administrator shall maintain only those records necessary to comply with this order. After [an operating unit head] refers an employee to an EAP, the EAP will maintain all records necessary to carry out its duties. All medical and or rehabilitation records concerning the employee's drug abuse, including EAP records of the identity, diagnosis, prognosis, or treatment are confidential and may be disclosed only as authorized by 42 C.F.R. Part 2, including the provision of written consent by the employee. With written consent, the patient may authorize the disclosure of those records to the patient's employer for verification of treatment or for a general evaluation of treatment progremss. (42 C.F.R. § 2.1 et seq. (1986), revised regulations promulgated at 52 F.R. 21796, June 9, 1987).

E. *Maintenance of Records in General*

All drug testing records must be maintained with due regard to applicable federal laws, rules and regulations regarding confidentiality of records including the Privacy Act, 5 U.S.C. § 552a and § 503 of the Act. All drug testing records shall be maintained for at least three years. If necessary, records may by maintained as required by subsequent administrative or judicial proceedings, or at the discretion of the Component head. The record keeping system should capture sufficient documents to meet the operational and statistical needs of this order, and include:

1. Notices of verified positive test results referred by the MRO;
2. Written materials justifying reasonable suspicion testing or evidence that an individual may have altered or tampered with a specimen;
3. Anonymous statistical reports; and
4. Other documents the DPC, MRO, or EAP Administrator deems necessary for efficient compliance with this order.

F. *Records Maintained By Government Contractors*

Any Component that hires a contractor to satisfy any part of this order shall require as part of the contract that all drug testing records maintained by the contractor comply with the confidentiality requirements of this order, § 503 of the Act, applicable federal laws, rules, regulations and guidelines.

G. *Statistical Information*

The DPC shall collect and compile anonymous statistical data for reporting the number of—

1. Random tests, reasonable suspicion tests, accident or unsafe practice tests, follow-up tests, or applicant tests administered;
2. Verified positive test results;
3. Voluntary drug counseling referrals;
4. Involuntary drug counseling referrals;
5. Terminations or denial of employment offers resulting from refusal to submit to testing;
6. Terminations or denial of employment offers resulting from alteration of specimens;
7. Terminations or denial of employment offers resulting from failure to complete a drug abuse counseling program; and
8. Employees who successfully complete EAP.

This data, along with other pertinent information, shall be compiled for inclusion in DOJ's annual report to Congress required by Section 503(f) of the Act. This data shall also be provided to HHS semi-annually to assist in overall program evaluation and to determine whether changes to the HHS Guidelines may be required.

Amendments
Approved:

/s/ Edwin Meese III
EDWIN MEESE III
Attorney General

Date: 17 Dec 87

DEPARTMENT OF JUSTICE

Order

OBD 1792.1

Jun. 27, 1988

Subject: DRUG-FREE WORKPLACE PROGRAM FOR THE OFFIES, BOARDS AND DIVISIONS

1. *PURPOSE.* This order establishes policy and procedures for the Drug-Free Workplace Program (hereinafter referred to as the OBD Program) for:

   a. Employee assistance.

   b. Supervisory training.

   c. Employee education.

   d. Identification of illegal drug use through drug testing on a carefully controlled and monitored basis.

2. *SCOPE.* When each Executive Branch agency, as specified in Section 503(a)(2) of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987), (hereinafter referred to as the Act, has complied with the provisions of Section 503(a) of the Act, this order shall be effective immediately for the following organizations (for the purposes of this order, hereinafter referred to as OBDs):

   Office of the Attorney General
   Office of the Deputy Attorney General
   Office of the Associate Attorney General
   Office of the Solicitor General
   Office of Intelligence Policy and Review
   Office of Justice Programs
   Office of Legal Counsel
   Office of Legal Policy

Office of Legislative Affairs
Office of Liaison Services
Office of Professional Responsibility
Office of Public Affairs
Office of the Pardon Attorney
Executive Office for Immigration Review
Executive Office for United States Attorneys
United States Attorneys' Offices
Executive Office for United States Trustees
United States Trustees' Offices
Community Relations Service
Justice Management Division
Antitrust Division
Civil Division
Civil Rights Division
Criminal Division
Tax Division
Land and Natural Resources Division
United States Parole Commission
International Criminal Police Organizations—
United States National Central Bureau

3. *AUTHORITY.* Executive Order 12564, the Act, 21 U.S.C. § 802(b), and the Department of Justice Drug-Free Workplace Plan dated September 25, 1987, as amended on December 17, 1987 (hereinafter referred to as the DOJ Plan).

4. *REFERENCES.* This order incorporates Departmental policy in the following program areas: discipline and adverse action, employee assistance and personnel security.

5. *POLICY.* It is the policy of the Department of Justice to achieve a drug-free workplace. The specific objectives, procedures and guidelines of this order are applicable solely within the OBDs listed in paragraph 2 of this order and are set forth to achieve a drug-free workplace.

6. *DEFINITIONS.*

a. *Applicant* means any individual tentatively selected for employment with the OBDS and includes any individual in the OBDs who has tentatively been identified for placement in a testing designated position (TDP) and who has not, immediately prior to the placement, been subject to random testing.

b. *Employee Assistance Program (EAP)* means the OBD-based counseling program that offers assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol and mental health problems, and monitors their progress while in treatment.

c. *Employee Assistance Program Administrator (EAPA)* means the individual responsible for ensuring the development, implementation and review of the agency EAP.

d. *Testing Designated Position* means positions within the OBDs which have been designated for random testing under Chapter 4, Section 6.B of the DOJ Plan, and paragraph 11a and 2 of this order.

7. *RESPONSIBILITIES.*

a. *Assistant Attorney General for Administration (AAG/A).* The AAG/A shall be the component head for purposes of this order and may delegate that authority. The AAG/A shall oversee the OBD Program and make final determinations for the OBDs on challenges to TDP classifications under Chapter 2.D of the DOJ Plan.

b. *Deputy Assistant Attorney General/Information and Administrative Services (DAAG/IAS).* The DAAG/IAS shall supervise the Drug Program Coordinator (DPC) and maintain supervisory

oversight over the OBD Program. The DAAG/IAS shall assure that necessary resources are provided to the DPC for the administration of the OBD Program.

c. *Deputy Assistant Attorney General/Controller (DAAG/C).* The DAAG/C shall provide necessary logistic support to the OBD Program including the generation and maintenance of the random pools and lists to be used in random testing selections.

d. *Drug Program Coordinator (DPC).*

(1) The OBDs shall have a DPC assigned to carry out the OBD Program. The DPC shall be responsible for implementing, directing, administering and managing the drug testing program within the OBDs. In addition, the DPC shall serve as the Contracting Officer's Technical Representative (COTR) and the principal contact with the laboratory in assuring the effective operation of the testing aspect of the OBD Program.

(2) In addition to those duties set forth in Chapter 3.C of the DOJ Plan, the DPC shall:

(a) Implement the OBD Plan under the supervision of the DAAG/IAS.

(b) Coordinate with and report to the DAAG/IAS on information and findings that may affect the reliability or accuracy of laboratory results.

(c) Confirm with the appropriate personnel official to determine whether an OBD applicant has been found to be drug-free.

(d) Assure that applicants with verified positive test results are not hired by the OBDs and that current employees with verified positive test results are taken out of testing designated positions during counseling or rehabilitation.

e. *Employee Assistance Program Administrator.* In addition to those duties set forth in Chapter 3.F of the DOJ Plan, the EAPA shall:

(1) Coordinate with the DPC, the Medical Review Officer (MRO) and supervisors, as appropriate.

(2) Work with the DPC to provide educational materials and training developed under the OBD Program to managers, supervisors and employees.

(3) Ensure that training is provided to assist supervisors in the recognition and documentation of facts and circumstances that support a reasonable suspicion that an employee may be using illegal drugs.

(4) Upon receipt of a verified positive test result from the MRO, transmit the test result to the appropriate management official empowered to initiate disciplinary action.

f. *Supervisors.* Supervisors shall carry out those duties set forth in Chapter 3.G of the DOJ Plan.

g. *Government Contractors.* Wherever existing facilities are inadequate to implement this order, the DAAG/IAS shall:

(1) Delegate authority for the administration of all related contracts and ensure that contractors chosen to perform duties under this order meet the Health and Human Services

(HHS) Scientific and Technical Guidelines and laboratory certification standards.

(2) Establish, by contract or other procurement mechanism, the position and specific responsibilities of the MRO as required by the HHS guidelines.

h. *Medical Review Officer (MRO).* The MRO is responsible for receiving laboratory results generated from the DOJ Drug-Free Workplace Program who is a licensed physician with knowledge of substance abuse disorders and the appropriate medical training to interpret and evaluate all positive test results together with an individual's medical history and any other relevant biomedical information.

8. *TESTING ANNOUNCEMENT AND NOTIFICATION PROCEDURES.*

a. *General Announcement.* A general announcement from the AAG/A announcing the testing program shall be provided to all OBD employees upon completion of the certification procedures pursuant to Sections 503(a)(1)(A), 503(a)(1)(B), and 503(a)(1)(C) of the Act, which shall conform to Chapter 2.A of the DOJ Plan.

b. *Individual Notification.* In addition to the general announcement, an individual notification and acknowledgement shall be distributed to all employees in testing designated positions and shall conform to Chapter 2.B and 2.C of the DOJ Plan.

c. *Administrative Relief.* As provided in Chapter 2.D of the DOJ Plan, the AAG/A is the designated official.

9. *OBD TESTING DESIGNATED POSITIONS.* Pursuant to the requirements of Executive Order 12564

and the DOJ Plan, employees in the following position categories have been selected as testing designated positions in the CBDs.

a. All incumbents currently authorized to have access to top secret classified information in accordance with Executive Order 12356.

b. All attorneys responsible for conducting grand jury proceedings and all personnel deemed necessary to assist such attorneys in the performance of their duties.

c. All incumbents serving under Presidential appointments.

d. All incumbents whose assigned position duties include the prosecution of criminal cases.

e. All incumbents whose assigned position duties include maintaining, storing or safeguarding a controlled substance as defined by Section 802(6) of Title 21 of the United States Code.

10. *NATURE, FREQUENCY, AND TYPE OF DRUG TESTING TO BE INSTITUTED.*

a. Section 503 of the Act requires the OBD Program to specify the nature, frequency, and type of drug testing to be instituted. The OBD Program includes the following types of drug testing:

(1) Applicant testing.

(2) Random testing of sensitive positions in testing designated positions.

(3) Probationary employee testing.

(4) Reasonable suspicion testing.

(5) Accident or unsafe practice testing.

(6) Voluntary testing.

(7) Testing as part of or as a follow-up to counseling or rehabilitation.

b. Incumbents in TDPs will be tested at an annual frequency of 7%. Those employees with less than one year of federal service in TDPs and applicants will be tested at an annual frequency of 100%. The Assistant Attorney General for Administration reserves the right to increase or decrease the frequency of testing based on the OBD mission, needs, availability of resources, and experience in the OBD Program, consistent with the duty to achieve a drug-free workplace under the Executive Order.

c. Section 503 of the Act requires the OBDs to specify the drugs for which individuals shall be tested. These are: marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP).

11. *RANDOM TESTING.*

a. *Positions Designated for Random Drug Testing.* The titles of positions designated for random drug testing and the procedures applied in such designations have been established and disseminated to Executive Officers in the OBDs.

b. *Random Testing Procedures.* Random testing procedures shall be in accordance with Chapter 4.C, D, E, G, H, I and J of the DOJ Plan.

12. *REASONABLE SUSPICION TESTING.*

a. *Procedures.*

(1) If an employee is suspected of using drugs, consistent with Chapter 4.A.3 of the DOJ Plan, the appropriate supervisor, in consultation with the EAPA, shall gather all in-

formation, facts and circumstances leading to and supporting this suspicion. A higher-leveled supervisor shall concur in a reasonable suspicion determinaton prior to coordinating with the DPC for scheduling a test.

(2) Once reasonable suspicion has been established, the DPC shall ensure that the record contains the circumstances which formed the basis of the determination that reasonable suspicion exists to warrant the testing. The report shall include, at a minimum, the dates and times of reported incidents, sources of information and appropriate factual observations.

b. *Obtaining the Sample.* In accordance with Chapter 4.H.1 of the DOJ Plan, if there is reason to believe an individual being tested under reasonable suspicion may alter or substitute the specimen provided, then privacy need not be afforded.

13. *APPLICANT TESTING.*

a. *Objectives.* To maintain the high professional standards of the OBD workforce, it is imperative that individuals who use illegal drugs be screened out during the initial employment process before they are placed on the employment rolls of the OBD.

b. *Extent of Testing.* Drug testing shall be required of all OBD applicants as defined in paragraph 6a of this order.

c. *Procedures.*

(1) The processing personnel office shall direct applicants to an appropriate collection facility. The drug test shall be undertaken as soon after notification as practicable, and

within 48 hours of notification to the applicant. Where appropriate, applicants may be reimbursed for reasonable travel expenses.

(2) Applicants shall be advised of the opportunity to submit medical documentation that may support a legitimate use for a specific drug and that such information will be reviewed only by the MRO or the staff of the MRO to determine whether the individual is licitly using an otherwise illicit drug.

d. *Personnel Officials.* Upon notification that an individual has been tentatively selected for employment with the OBDs, the processing personnel office or DPC shall assure, after consultation with the MRO or the staff of the MRO, that a drug test has been conducted and that the result was negative.

e. *Consequences.* The OBDs shall decline to extend a final offer of employment to any applicant with a verified positive test result, and such applicant may not reapply for a period of six months. The Personnel Officer working on the applicant's certificate shall be directed to object to the applicant on the basis of failure to pass the physical, a lack of personal characteristics necessary to relate to public employment or failure to support the mission of the OBDs. The OBDs shall inform the applicant that a confirmed presence of drugs in the applicant's urine precludes the OBD from hiring the applicant.

14. *ADDITIONAL TYPES OF DRUG TESTING.*

a. *Accident or Unsafe Practice Testing.* The OBDs are committed to providing a safe and secure work environment. Employees involved in on-the-job accidents or who engage in unsafe on-duty

job-related activities that pose a danger to others or the overall operation of the OBDs, may be subject to testing. Based on the circumstances of the accident or unsafe act, the DPC may initiate testing when there is:

(1) Evidence of an unsafe practice.

(2) Significant damage to property.

(3) Careless operation of a vehicle.

(4) Significant injury to persons.

(5) A pattern of erratic incidents.

b. *Voluntary Testing.* Voluntary testing shall be conducted as provided under Chapter 4.A.2 and 4.K.5 of the DOJ Plan.

c. *Follow-up Testing.* All employees referred through administrative channels who undergo a couseling or rehabilitation program of illegal drug use through the EAP as a result of the drug testing program will be returned to the random testing pool following completion of such a program. In addition, these individuals will be placed in a follow-up pool where they will be subject to regular unannounced testing for a period of one year. Such employees shall be tested at the amount stipulated in the abeyance contract, or, in the alternative, at an increased frequency of ten times per year. Such testing is distinct from testing which may be imposed as a component of the EAP.

15. *TEST PROCEDURES.*

a. *General.* The OBDs shall comply with applicable test procedures specified in the DOJ Plan.

b. *Suspect Samples.* Collection site personnel shall retain any sample that shows evidence of tampering or substitution under the HHS Scientific

and Technical Guidelines. After consultation with the DPC and in accordance with Chapter 4.A.3 of the DOJ Plan, a second sample may be required under direct observation.

16. *FINDING OF DRUG USE AND DISCIPLINARY CONSEQUENCES.*

a. *Mandatory Administrative Actions.*

(1) Upon a finding of illegal drug use, action shall be taken as specified in Chapter 4.K of the DOJ Plan.

(2) As provided in Chapter 4.K.2 of the DOJ Plan, the AAG/A shall determine whether the employee may return to duty in a sensitive position.

b. *Range of Consequences.* The severity of the disciplinary action taken against an employee found to use illegal drugs will depend on the circumstances of each case, and will be consistent with the Executive Order and includes the full range of disciplinary actions, including removal. The OBDs shall initiate disciplinary action against any employee found to use illegal drugs but shall not discipline an employee who voluntarily admits to illegal drug use in accordance with the Voluntary Referral Provision in paragraph 16c of this order.

c. *Voluntary Referral.*

(1) Chapter 4.K.3 of the DOJ Plan permits the OBDs to create a SAFE HARBOR for an employee who voluntarily identifies himself/herself as a user of illegal drugs in accordance with Section 5(b)(1)-(3) of the Executive Order. Accordingly, the OBDs shall not initiate disciplinary action against any OBD employee who:

(a) Voluntarily identifies himself/herself as a user of illegal drugs prior to being identified through other means;

(b) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(c) Thereafter refrains from using illegal drugs.

(2) This self-referral option allows any employee to step forward and identify himself/herself as a user of illegal drugs for the purpose of obtaining counseling or rehabilitation.

(3) In stepping forward, and consistent with the voluntary testing provision in Chapter 4.A.2 of the DOJ Plan, an employee may also volunteer for a drug test as a means of self-identification. Although this self-identification test may yield a verified positive test result, such test result shall merely constitute an identification for purposes of this section.

(4) Since the key to this provision's rehabilitative effectiveness is an employee's self-identification prior to being identified through other means, this provision shall not be available to an employee who is required to provide a urine sample under this order or who is found to have used illegal drugs pursuant to Chapter 4.K.1(a), (b) or (c) of the DOJ Plan and who thereafter requests protection under this provision.

17. *EMPLOYMENT ASSISTANCE PROGRAMS.*

a. *Function.* The OBD EAP plays an important role in preventing and resolving employee drug use by: demonstrating the OBD commitment to eliminating illegal drug use; providing employees

an opportunity, with appropriate assistance, to discontinue their drug use; providing educational materials to supervisors and employees on drug use issues; assisting supervisors in confronting employees who have performance and/or conduct problems and making referrals to appropriate treatment and rehabilitative facilities; and following individuals during the rehabilitative-period to track their progress and encourage successful completion of the program. The EAP, however, shall not be involved in the collection of urine samples or the initial reporting test results. The purpose of the EAP is to:

(1) Provide counseling and assistance to employees who self-refer to treatment or whose drug tests have been confirmed positive, and monitor the employees' progress through treatment and rehabilitation.

(2) Provide needed education and training to all levels of the OBDs on types and effects of drugs, symptoms of drug use and its impact on performance and conduct, the relationship of the EAP to the drug testing program, and finally, treatment, rehabilitation, and records confidentiality requireemnts.

(3) Ensure that confidentiality of test results and related medical treatment and rehabilitation records is maintained in accordance with the confidentiality requirements of Chapter 5 of the DOJ Plan.

b. *Referral and Availability.* Any employee found ot use illegal drugs shall be referred to the EAP. The EAP shall be administered separately from the testing program in accordance with Order DOJ 1792.1, and be available to all employees without regard to a finding of drug use. The

EAP shall provide counseling of rehabilitation for all referrals, as well as education and training regarding illegal drug use. The EAP is available not only to OBD employees, but, when feasible, to the families of employees with drug problems, and to employees with family members who have drug problems.

c. *Leave Allowances.* Employees may be allowed up to one hour (or more as necessitated by travel time) of excused absence for each counseling session, during the assessment/referral phase of rehabilitation. Absences during duty hours for rehabilitation or treatment will be charged in accordance with applicable law leave regulations.

d. *Records and Confidentiality.* All EAP counseling, rehabilitation or drug testing records shall be maintained in compliance with the confidentiality requirements of this order, the DOJ Plan, Chapter 5, § 503 of the Act, applicable federal laws, rules, regulations and guidelines.

e. *Structure.* The AAG/A shall be responsible for oversight and implementation of the OBD EAP, and shall provide, with the support of the Attorney General, high level direction to and promotion of the EAP.

18. *SUPERVISORY TRAINING.*

a. *Objectives.* As supervisors have a key role in establishing and monitoring a drug-free workplace, training shall be provided to assist supervisors and managers in recognizing and addressing, with the assistance and expertise of the EAP, illegal drug use by OBD employees. The purpose of supervisory training is to understand:

(1) Departmental policies relevant to work performance problems, drug use, and the OBD EAP.

(2) The responsibilities of offering EAP services.

(3) How employee performance and behavior changes, should be recognized and documented.

(4) The respective roles of the MRO, supervisors, personnel officials, and EAP staff.

(5) The ways to use the OBD EAP.

(6) How the EAP is linked to the performance appraisal and the disciplinary processes.

(7) The process of reintegrating employees into the workforce.

b. *Implementation.* The Justice Management Division shall be responsible for implementing supervisory training, and shall develop a training package to ensure that all employees and supervisors are informed of the OBD Drug-Free Workplace Plan.

c. *Training Package.* Supervisory training shall be required for all supervisors and may be presented as a separate course, or be included as part of an on-going supervisory training program. Training shall be provided as soon as possible after a person assumes supervisory responsibility. Training courses should include:

(1) Overall Departmental policy.

(2) The prevalence of various employee problems with respect to drugs and alcohol.

(3) The EAP approach to handling problems.

(4) How to recognize employees with possible problems.

(5) Documentation of employee performance or behavior.

(6) How to approach the employee.

(7) How to use the EAP.

(8) Disciplinary action, and removals from sensitive positions as required by Section 5(c) of the Executive Order.

(9) Reintegration of employees into the workforce.

(10) Written materials which the supervisor can use at the work site.

19. *EMPLOYEE EDUCATION.*

a. *Objective.* The EAPA shall offer drug education to all OBD employees. Drug education shall include:

(1) Types and effects of drugs.

(2) Symptoms of drug use, and the effects on performance and conduct.

(3) The relationship of the EAP to the drug testing program.

(4) Other relevant treatment, rehabilitation, and confidentiality issues.

b. *Means of Education.* Drug education activities may include:

(1) Distribution of written materials.

(2) Videotapes and films.

(3) Lunchtime employee forums.

(4) Employee drug awareness days.

20. *RECORDS AND REPORTS CONFIDENTIALITY.*

All records and reports under this order shall be maintained in conformity with the confidentiality requirements of Chapter 5 of the DOJ Plan, § 503

of the Act, applicable laws, rules, regulations and guidelines.

/s/ Harry H. Flickinger
HARRY H. FLICKINGER
Assistant Attorney General
for Administration

Titles	*Location*
Chief	Legal Policy Section
Chief, Legal Advisory Unit	Antitrust Division
Chief, Legislative Unit	
Trial Attorney	
Secretary	

Incumbents in this section contribute to long-range planning projects, evaluate current Division programs, apply policy considerations to proposals for specific cases and investigations, and develop and support Division positions on legislative matters. They also advise employees on matters of professional ethics.

Decisions and performance influenced or impaired by illegal drug use could result in inconsistent or poorly conceived policy development and implementation, failure to identify problems and recommend improvements in the way the Division accomplishes its mission, and lack of initiative to make legislative or management changes to improve overall effectiveness. The ultimate result would be economic harm to American consumers and businesses, to the detriment of the overall economy. Drug usage could also result in mishandling of grand jury, sensitive, and security classified materials, compromising the integrity of the criminal investigation process, the government decision-making process, or national security interests.

Titles	*Location*
Chief	Criminal Section
Supervisory Trial Attorney	Civil Rights Division
General Attorney	
Trial Attorney	
Law Clerk	
Paralegal Specialist	
Legal Technician	
Secretary	
Clerk	

Incumbents in these positions are responsible for the investigation and prosecution of individuals alleged to have violated federal criminal civil rights statutes designed to preserve personal liberties; e.g., persons acting under color of law or in conspiracy with others to interfere with federally protected rights; persons holding individuals in peonage or involuntary servitude; or, the use of force or threats of force to injure or intimidate any person exercising certain federal rights and activities.

Drug usage could result in a significant loss of individual rights, personal safety and a serious breach of public trust. Illegal drug usage could result in the failure to appropriately handle allegations of criminal misconduct. For example, bizarre allegations of criminal misconduct against public officials and private individuals continue to occur, e.g., involuntary servitude/peonage of migrant workers. If these allegations had been received by an individual using illegal drugs, judgment may have impaired decision to forward for investigation and, ultimately, prosecution of this incident allowing for not only continued violations, but, possibly, increasing the number of individuals held involuntarily. Drug use could also jeopardize the level of secrecy required in grand jury preparation and presentation.

Titles	*Location*
Chief, Environmental Crimes Section	Environmental Crimes Section
Assistant Chief, Environmental Crimes Section	
Trial Attorney	
Paralegal Specialist	
Secretary (Typing)	
Clerk (Typing)	

Incumbents in this office evaluate, investigate, supervise and prosecute criminal cases related to the control and abatement of pollution to the nation's air and water resources, the regulation and control of toxic substances, pesticides and solid wastes. Incumbents prosecute criminal cases for violations of the criminal provisions of the Resources Conservation and Recovery Act, as amended, the Clean Water, Air and other statutes including traditional Title 18 offenses in conjunction with violations of those environmental statutes. Incumbents provide legal counseling to client agencies and the Federal Bureau of Investigation. Incumbents, under the direction of the Chief, prosecute criminal cases under environmental statutes administered by the Environmental Protection Agency, Army Corps of Engineers, the Coast Guard, Customs and the Department of Transportation and under Title 18 offenses related to those environmental statutes. In addition to prosecuting cases, incumbents provide support to the United States Attorneys Offices both in cases where the USAs have the lead and in jointly handled cases. Incumbents also coordinate among districts to assure consistency on common issues and assist the FBI and other investigating agencies in the investigation of alleged violations.

Drug usage by incumbents could have serious repercussions for the federal government. For example, if attorneys fail to vigorously carry out close investigations and prosecutions or to exercise sound judgment, serious

felonies may escape detection and prosecution. Also, drug use by incumbents could result in the disclosure of the identities of confidential sources and informants who could be subject to physical harm. The section has access to grand jury material and evidence which, if disclosed, would compromise criminal prosecutions.

Titles	*Location*
Solicitor General Deputy Solicitor General Trial Attorney Attorney Advisor Executive Assistant Administrative Staff Assistant Secretary * Staff Assistant *	Office of the Solicitor General

Incumbents in this office are responsible for conducting and supervising all aspects of government litigation in the Supreme Court of the United States. Incumbents also review every case litigated by the federal government that a lower court has decided against the United States to determine whether to appeal, and decide whether the United States should file a brief as *amicus curia* in any appellate court. A significant part of the work of OSG involves government agencies that have conducted lower court litigation themselves. In addition, many cases stem from activities of executive departments of the government.

Illicit drug use by incumbents could result in serious damage to the legal system and reputation of the United States. The integrity of the office is premised, above all, on respect for the law. It would be inconsistent with the mission of the office for its incumbents simultaneously to represent the United States before this nation's highest court while violating its criminal statutes. Such conduct would constitute a serious breach of the public trust. Mistakes caused thorough impaired judgement could prove extremely expensive to the to the American taxpayer. For example, the loss of a liability lawsuit by the Government could establish dangerous precedent and cost the Government incalculable sums of money.

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* Only incumbents with a Top Secret security clearance.

OFFICES, BOARDS AND DIVISIONS (OBD)[1]
EMPLOYEE NOTICE

Jun. 27, 1988

SUBJECT: GENERAL NOTICE OF DRUG TESTING

Executive Order 12564, signed by President Reagan on September 15, 1986 establishes the policy of the United States Government to achieve a Drug-Free Federal Workplace. In a letter to all Executive Branch employees dated October 4, 1986, the President reiterated his goal of ensuring a safe and drug-free workplace for all Federal workers. The intent of the policy is to offer a helping hand to those who need it, while sending a clear message that any illegal drug use is, quite simply, incompatible with Federal service.

Pursuant to the Executive Order and the Department of Justice Drug-Free Workplace Plan, this notice provides each OBD employee information that the Plan includes both mandatory and voluntary urinalysis testing provisions. Random drug testing and applicant drug testing may begin no sooner than 60 days after this notice. Testing will be carried out in accordance with the DOJ Plan and the Mandatory Guidelines for Federal Workplace Drug Testing Programs. [*Federal Register*, Vol. 53, No. 69 (April 11, 1988)].

Employees who hold positions selected for random testing will receive an individual notice, prior to the commencement of testing, indicating that their position has been designated a "testing designated position." Individuals who wish to volunteer for drug testing should call 633-2233.

Since the primary purpose of this program is to achieve a drug-free workplace while offering a helping hand, OBD employees should be aware of the opportunity for

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[1] Includes OBDs as defined in 28 CFR Subpart A § 0.1 and all U.S. Attorneys Offices and the Office of Justice Programs.

assistance provided by the Department of Justice Employee Assistance Program (EAP). Any OBD employee may seek counseling and rehabiiitation by contacting the EAP at (FTS) 633-1846. In addition, the OBD Order contains a "safe harbor" provision designed to provide employees incentive to admit their illegal drug use and obtain help. Under this provision, any employee who (1) voluntary admits his/her illegal drug use prior to being notified for a drug test; (2) enters and successfully completes a drug treatment program; and (3) thereafter refrains from illegal drug use, will not be subject to disciplinary action.

/s/ Harry H. Flickinger
HARRY H. FLICKINGER
Assistant Attorney General
for Administration

SUPPLEMENTAL Q & A

1. Q: What are the circumstances under which testing may occur?

   A: Under the OBD Order drug testing may occur under these circumstances: (1) applicant testing (2) random testing of sensitive employees in testing designated positions; (3) reasonable suspicion testing; (4) accident or unsafe practice testing; (5) voluntary testing; and (6) testing as a follow-up to counseling or rehabilitation.

2. Q: What testing procedure will be followed under the OBD order?

   A: All testing will be done in accordance with the Scientific and Technical Guidelines established by the Department of Health and Human Services for federal drug testing. Samples will be collected using strict chain-of-custody procedures. Testing will only be done by certified laboratories. Although a screening test using an FDA-approved immunoassay test will be utilized, no test will be reported positive unless there has been a confirmation test by the highly accurate Gas Chromatography/Mass Spectrometry assay and there has been a thorough review by a Medical Review Officer (MRO). There will be privacy in the collection of samples, and confidentiality in the results. Under some circumstances, employees will be required to provide samples under direct observation.

3. Q: What procedure do I follow if I am taking prescription medication when called for drug testing?

   A: Before conducting a drug test, every employee will be given the opportunity to submit medical documentation that may support a legitimate use

for a specific drug. Prior to making a final decision to verify a positive test result, the Medical Review Officer shall give the individual an opportunity to discuss the test result with him/her. Further, the MRO is required to review all records provided by the tested employee when the test results could have resulted from legally prescribed medication. If the drug is lawfully prescribed, the MRO is required to report the test result as negative. Employees should also be careful to note non-prescription drugs used.

4. Q: What are the consequences for an employee who tests positive or refuses to be tested?

   A: The Department may not allow an employee found to use illegal drugs to remain on duty in a sensitive position. Every employee found to use illegal drugs will be referred to an Employee Assistance Program. The Executive Order requires the Department to initiate disciplinary action against an employee found to use illegal drugs. Such action may range from a written reprimand to removal. Upon a second finding of illegal drug use, removal is mandatory. An employee who refuses to be tested will be subject to the full range of disciplinary action, including removal.

5. Q: How can an employee voluntarily admit illegal drug use, gain assistance, and avoid discipline?

   A: Any OBD employee, prior to being notified to report to a collection facility for testing, who voluntarily admits his or her illegal drug use will be protected by a provision of the OBD Order called the "safe harbor." As specified in the Order's safe harbor provisions, if that employee successfully completes a drug counseling or rehabilitation program, and thereafter, refrains

from illegal drug use, no disciplinary action will be initiated.

6. Q: How and when may an employee appeal their designation of being in a Testing Designated Position?

   A: The employee may file an administrative appeal to the Assistant Attorney General for Administration (AAG/A) who has the authority to remove the employee from the TDP list. The appeal must be submitted by the employee in writing, within 15 days from the date he/she receives the specific notice, setting forth all relevant information. The appeal shall be reviewed based on the criteria applied in designating the position as a TDP. The AAG/A's decision is final and is not subject to further review. All determinations will be issued in writing and an employee who has filed an appeal will not be subjected to random testing until the appeal is answered in writing.

7. Q: How do I obtain counseling or rehabilitation for illegal drug use or other personal problems?

   A: Any OBD employee may seek counseling and rehabilitation for drug use. It is the policy of the Department to offer confidential assistance to employees who have personal problems, and to encourage employees to voluntarily seek assistance through the Employee Assistance Program (EAP). It is our hope that individuals who are using illegal drugs will not wait to be detected through urinalysis but, instead, will voluntarily seek assistance. By taking advantage of the SAFE HARBOR policy, as specified in the OBD Plan, every employee can avoid disciplinary consequences. Employees who need assistance are urged to see an EAP counselor immediately be-

fore testing commences, by contacting the EAP at (FTS) 633-1846.

8. Q: What arrangements will be made for an employee who is required to stay at the urinalysis collection facility, beyond normal duty hours?

   A: Any employee who is required to stay beyond normal duty hours is in a mandatory overtime situation and will be compensated for that time, like any other mandatory overtime situation. Furthermore, employees may be reimbursed for transportation home should the requirements to stay beyond normal duty hours cause an employee to alter their normal commuting arrangements. Employees will not be left stranded if they have no funds to pay for transportation (i.e., employees who are in carpools and would not normally pay for bus/cab).

9. Q: Whom can a JMD Bargaining Unit employee contact with questions about rights with respect to the OBD drug testing program?

   A: If a JMD employee has any questions about his/her rights as a bargaining unit employee with respect to this drug testing program, he/she may contact a representative of AFSCME Local #3097.

10. Q: How many drugs will be tested for under the OBD drug testing program?

    A: Five: marijuana, cocaine, opiates, amphetamines, and PCP.

11. Q: What does an employee's signature on the specific notice reflect?

    A: The signature is an acknowledgement that the employee has received and read the notice. The signature does not reflect agreement/disagree-

ment with the legality of the program, nor does an employee waive any appeal or grievance or judicial right that he/she may have with respect to participation in or challenging the results of drug testing.

12. Q: What will happen if an employee refuses to sign the individual notice?

    A: The employee's supervisor will sign the individual notice to document that the employee received a copy, and will have a witness sign the form also for the same reason as the supervisor signs it.

13. Q: What part does the Employee Assistance Program (EAP) play in drug testing?

    A: Although the EAP and drug testing program are administered separately, a primary goal of the drug-free workplace initiative is to offer a helping hand to employees with problems. The EAP is this "helping hand."

    The EAP is a confidential service designed to assess an individual's problem, provide short-term counseling and refer individuals in need of formal long-term treatment to outside accredited facilities. However, employees have the choice of using the EAP referral or their own therapeutic agency or program for the purposes of engaging in rehabilitation. Employees must properly participate in such program and agree to limited disclosure.

14. Q: Under what circumstances will an employee scheduled for a random test be granted a deferral?

    A: In accordance with DOJ Plan, Chapter 4.D, an employee selected for random drug testing may have the test deferred if the employee's first and

DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE
MONDAY, JUNE 27, 1988

AG
202-633-2007
(TDD) 202-786-5731

Attorney General Edwin Meese III today announced that the Department of Justice has issued 60-day notices to the employees in its Washington area components in connection with the Executive Order for a drug free workplace signed by President Reagan on September 15, 1986.

"The issuance of the 60-day notices is a major step in implementing the Executive Order and in achieving the President's goal of a drug-free federal workplace," Meese said.

Today's notices are being issued to the approximately 6,500 employees in office components at Justice Headquarters in Washington, with the exception being the United States Attorneys Offices and the Office of Justice Programs. Those organizations will be receiving their 60-day notices within the next several months.

The Order allows for "reasonable suspicion", "post-accident or unsafe practice" and "probationary" testing of all employees within these components. All applicants for employment in these components will also be subject to drug testing. In addition, the Plan provides for limited random drug testing of those employees within these components who hold sensitive positions. It also provides for referrals for counseling and treatment for employees found to be using illegal drugs, as well as follow-up testing as part of the employee assistance program.

Approximately 1,800 of the 6,500 employees hold sensitive positions subject to random testing, and will be tested at a frequency of seven percent, or 126 individuals, per year. These testing designated positions for random testing fall into at least one of the following categories:

—All employees currently authorized to have access to top secret classified information;

—All attorneys responsible for conducting grand jury proceedings and all personnel deemed necessary to assist such attorneys in the performance of their duties;

—All incumbents serving under Presidential appointments;

—All incumbents whose assigned position duties include the prosecution of criminal cases; and,

—All incumbents whose assigned position duties include maintaining, storing or safeguarding a controlled substance (evidence custodians).

Issuance of the notices means that random drug testing may begin as soon as 60 days from today. Each of the employees holding a testing designated position will receive an individual notice of that fact before random testing is to begin.

The Executive Order recognized that the federal government, being the largest employer in the Nation, can and should show the way towards achieving a drug free workplace through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the federal workplace.

"Every federal agency must work toward the goal of a drug free workplace, but it is doubly important for the agency with primary responsibility for enforcing the nation's laws, and especially the nation's drug laws, to ensure that its employees are drug free," Meese said.

"For any of our employees to use illegal drugs is to compromise the Department's law enforcement mission." Meese added.

"The use of illegal drugs could lead to the unauthorized disclosure of confidential information which could se-

riously harm national security, it can lead to lost productivity and mistakes in judgment, and it can make employees susceptible to blackmail or bribery.

"In order to have the public's cooperation in the war against drugs, it is crucial that the public be assured that those who enforce the laws are themselves upholding the law.

"Between now and the issuance of the individual notices, we plan to continue to educate our employees about the importance of being drug free and about the Department's drug free workplace plan," Meese said. "I encourage employees to read the educational materials provided to them with their 60-day notices and to ask their supervisors any questions they may have regarding implementation of the program."

"It is important for our employees and the general public to understand that the random testing called for in the Executive Order is designed to deter non-users from ever starting and to provide an incentive to those who are using to stop by enrolling in treatment through an employee assistance program.

"In many respects the federal government is catching up with those private employers who already have drug testing in place. Between 30 and 50 percent of the Fortune 500 companies currently have some form of employee drug testing program.

"But, we also hope to set an example for the rest of the country by providing the public with what we believe is a model plan which balances the employee's right to privacy with the employer's right to know that employees are drug free and thus fit for duty," Meese said.

The Department's educational materials emphasize aspects of the drug testing program that are designed to ensure absolute accuracy of the results, including a two-stage testing process, careful chain-of-custody requirements and oversight by a Medical Review Officer.

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Executive Order 12564 declared that "The use of illegal drugs, on or off duty, by federal employees impairs the efficiency of federal departments and agencies, undermines the public confidence in them and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively."

With the issuance of the 60-day notices today, the offices, boards, and litigating divisions of the Departments of Justice join the Bureau of Prisons, the Office of Personnel Management, the Veterans Administration, and the Department of Transportation as federal government components that have issued notices and begun implementation of the Executive Order.

To date, federal courts that have addressed the question of drug testing in the workplace have split on the constitutionality of random testing, but U.S. Courts of Appeal have held random testing to be constitutional in all but one circuit.

The Supreme Court will hear arguments next term on the constitutionality of drug testing for Customs Service employees and for railroad workers.

MANDATORY GUIDELINES FOR FEDERAL WORKPLACE DRUG TESTING PROGRAMS

2.2 Specimen Collection Procedures.

(a) Designation of Collection Site. Each agency drug testing program shall have one or more designated collection sites which have all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and shipping or transportation of urine specimens to a certified drug testing laboratory.

(b) Security. Procedures shall provide for the designated collection site to be secure. If a collection site facility is dedicated solely to urine collection, it shall be secure at all times. If a facility cannot be dedicated solely to drug testing, the portion of the facility used for testing shall be secured during drug testing.

(c) Chain of Custody. Chain of custody standardized forms shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine specimens from one authorized individual or place to another shall always be accomplished through chain of custody procedures. Every effort shall be made to minimize the number of persons handling specimens.

(d) Access to Authorized Personnel Only. No unauthorized personnel shall be permitted in any part of the designated collection site when urine specimens are collected or stored.

(e) Privacy. Procedures for collecting urine specimens shall allow individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided.

(f) Integrity and Identity of Specimen. Agencies shall take precautions to ensure that a urine specimen not be adulterated or diluted during the collection procedure and that information on the urine bottle and in the record book can identify the individual from whom the specimen was collected. The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified:

(1) To deter the dilution of specimens at the collection site, toilet bluing agents shall be placed in toilet tanks wherever possible, so the reservoir of water in the toilet bowl always remains blue. There shall be no other source of water (e.g., no shower or sink) in the enclosure where urination occurs.

(2) When an individual arrives at the collection site, the collection site person shall request the individual to present photo identification. If the individual does not have proper photo identification, the collection site person shall contact the supervisor of the individual, the coordinator of the drug testing program, or any other agency official who can positively identify the individual. If the individual's identity cannot be established, the collection site person shall not proceed with the collection.

(3) If the individual fails to arrive at the assigned time, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(4) The collection site person shall ask the individual to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remain with the outer garments. The individual may retain his or her wallet.

(5) The individual shall be instructed to wash and dry his or her hands prior to urination.

(6) After washing hands, the individual shall remain in the presence of the collection site person and shall not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen.

(7) The individual may provide his/her specimen in the privacy of a stall or otherwise partitioned area that allows for individual privacy.

(8) The collection site person shall note any unusual behavior or appearance in the permanent record book.

(9) In the exceptional event that an agency-designated collection site is not accessible and there is an immediate requirement for specimen collection (e.g., an accident investigation), a public rest room may be used according to the following procedures: A collection site person of the same gender as the individual shall accompany the individual into the public rest room which shall be made secure during the collection procedure. If possible, a toilet bluing agent shall be placed in the bowl and any accessible toilet tank. The collection site person shall remain in the rest room, but outside the stall, until the specimen is collected. If no bluing agent is available to deter specimen dilution, the collection site person shall instruct the individual not to flush the toilet until the specimen is delivered to the collection site person. After the collection site person has possession of the specimen, the individual will be instructed to flush the toilet and to participate with the collection site person in completing the chain of custody procedures.

(10) Upon receiving the specimen from the individual, the collection site person shall determine that it contains at least 60 milliliters of urine. If there is less than 60 milliliters of urine in the container, additional urine shall

be collected in a separate container to reach a total of 60 milliliters. [The temperature of the partial specimen in each separate container shall be measured in accordance with paragraph (f)(12) of this section, and the partial specimens shall be combined in one container.) The individual may be given a reasonable amount of liquid to drink for this purpose (e.g., a glass of water). If the individual fails for any reason to provide 60 milliliters of urine, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(11) After the specimen has been provided and submitted to the collection site person, the individual shall be allowed to wash his or her hands.

(12) Immediately after the specimen is collected, the collection site person shall measure the temperature of the specimen. The temperature measuring device used must accurately reflect the temperature of the specimen and not contaminate the specimen. The time from urination to temperature measurement is critical and in no case shall exceed 4 minutes.

(13) If the temperature of a specimen is outside the range of 32.5°-37.7°C/90.5°-99.8°F, that is a reason to believe that the individual may have altered or substituted the specimen, and another specimen shall be collected under direct observation of a same gender collection site person and both specimens shall be forwarded to the laboratory for testing. An individual may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the individual may have altered or substituted the specimen caused by the specimen's temperature falling outside the prescribed range.

(14) Immediately after the specimen is collected the collection site person shall also inspect the specimen to determine its color and look for any signs of contami-

nants. Any unusual findings shall be noted in the permanent record book.

(15) All specimens suspected of being adulterated shall be forwarded to the laboratory for testing.

(16) Whenever there is reason to believe that a particular individual may alter or substitute the specimen to be provided, a second specimen shall be obtained as soon as possible under the direct observation of a same gender collection site person.

(17) Both the individual being tested and the collection site person shall keep the specimen in view at all times prior to its being sealed and labeled. If the specimen is transferred to a second bottle, the collection site person shall request the individual to observe the transfer of the specimen and the placement of the tamperproof seal over the bottle cap and down the sides of the bottle.

(18) The collection site person and the individual shall be present at the same time during procedures outlined in paragraphs (f)(19)-(f)(22) of this section.

(19) The collection site person shall place securely on the bottle an identification label which contains the date, the individual's specimen number, and any other identifying information provided or required by the agency.

(20) The individual shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her.

(21) The collection site person shall enter in the permanent record book all information identifying the specimen. The collection site person shall sign the permanent record book next to the identifying information.

(22) The individual shall be asked to read and sign a statement in the permanent record book certifying that the specimen identified as having been collected from him or her is in fact that specimen he or she provided.

(23) A higher level supervisor shall review and concur in advance with any decision by a collection site person to obtain a specimen under the direct observation of a same gender collection site person based on a reason to believe that the individual may alter or substitute the specimen to be provided.

(24) The collection site person shall complete the chain of custody form.

(25) The urine specimen and chain of custody form are now ready for shipment. If the specimen is not immediately prepared for shipment, it shall be appropriately safeguarded during temporary storage.

(26) While any part of the above chain of custody procedures is being performed, it is essential that the urine specimen and custody documents be under the control of the involved collection site person. If the involved collection site person leaves his or her work station momentarily, the specimen and custody form shall be taken with him or her or shall be secured. After the collection site person returns to the work station, the custody process will continue. If the collection site person is leaving for an extended period of time, the specimen shall be packaged for mailing before he or she leaves the site.

(g) Collection Control. To the maximum extent possible, collection site personnel shall keep the individual's specimen bottle within sight both before and after the individual has urinated. After the specimen is collected, it shall be properly sealed and labeled. An approved chain of custody form shall be used for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on an approved chain of custody form each time a specimen is handled or transferred and every individual in the chain shall

be identified. Every effort shall be made to minimize the number of persons handling specimens.

(h) Transportation to Laboratory. Collection site personnel shall arrange to ship the collected specimens to the drug testing laboratory. The specimens shall be placed in containers designed to minimize the possibility of damage during shipment, for example, specimen boxes or padded mailers; and those containers shall be securely sealed to eliminate the possibility of undetected tampering. On the tape sealing the container, the collection site supervisor shall sign and enter the date specimens were sealed in the containers for shipment. The collection site personnel shall ensure that the chain of custody documentation is attached to each container sealed for shipment to the drug testing laboratory.

(2)

No. 89-679

In the Supreme Court of the United States

OCTOBER TERM, 1989

DANIEL BELL, ET AL., PETITIONERS

v.

DICK THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits random drug testing of employees of the Justice Department who hold top secret security clearances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-37a) is reported at 878 F.2d 484. The opinion of the district court (Pet. App. 38a-49a) is reported at 690 F. Supp. 65.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1989. A petition for rehearing and a suggestion for rehearing en banc were denied on September 1, 1989. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on October 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 25, 1987, after more than a year of study, the Department of Justice announced its Drug-Free Workplace Plan. Pet. App. 70a-104a. To prevent illegal drug use by the Department's workforce, while at the same time assuring that employees' "personal dignity and privacy [would] be respected" (*id.* at 73a), the Plan established a comprehensive program whose elements include (1) employee assistance in obtaining treatment and counseling for drug abuse problems; (2) supervisory training in detecting and dealing with drug problems; (3) employee education on the dangers of illegal drugs; and (4) identification of illegal drug use through drug testing. *Ibid.*

On December 15, 1987, the Department issued its Drug-Free Workplace Plan for its Offices, Boards, and Litigating Divisions ("OBD Plan"). Pet. App. 105a-127a.[1] The OBD Plan authorizes random urinalysis drug testing of five categories of employees in sensitive positions: (1) employees who have top secret security clearances; (2) attorneys responsible for conducting grand jury proceedings and personnel who assist them; (3) incumbents serving under Presidential appointments; (4) attorneys whose duties include the prosecution of criminal cases; and (5) attorneys and other employees

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[1] The Department components that are included in the OBD Plan are listed at Pet. App. 105a-106a. Several Department components have separate drug programs, and thus are not included in the OBD Plan. Those components include the Immigration and Naturalization Service, the Drug Enforcement Administration, the Federal Bureau of Investigation, the United States Marshals Service, and the Bureau of Prisons.

whose duties include maintaining, storing, or safeguarding a controlled substance. *Id.* at 111a. The OBD Plan's procedures for sample collection and urinalysis testing conform to the requirements prescribed by the Department of Health and Human Services for all federal employee drug-testing programs. *Id.* at 115a-116a. These procedures were before this Court in *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. 1384, 1388-1389, 1394 n.2 (1989).

2. Petitioners are ten Department of Justice attorneys who hold top secret national security clearances and thus are subject to random testing under the OBD Plan. See Pet. 2-3. Along with 32 other Department employees, petitioners commenced this action seeking, inter alia, an injunction prohibiting the Department from implementing drug testing under the OBD Plan. The district court granted petitioners' motion for a preliminary injunction, and enjoined the Department from "implementing mandatory random testing by urinalysis in the Offices, Boards and Litigating Divisions of the Department of Justice." Pet. App. 50a. On respondents' application, the district court entered an order making that injunction permanent. *Id.* at 52a.

3. After this Court denied petitioners' petition for certiorari before judgment, *Harmon* v. *Thornburgh*, 109 S. Ct. 328 (1988), the court of appeals affirmed in part, reversed in part, and remanded to the district court for further proceedings. Pet. App. 3a-37a.[2]

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[2] In a separate order entered the day after oral argument in the court of appeals, the court dissolved the district court's injunction with respect to Presidential appointees and employees whose duties include the storing, maintaining, or safeguarding of a controlled substance. The court found that none of the

The court of appeals noted (Pet. App. 8a) that its disposition of the case was "guided–and to a large extent, controlled–by" this Court's recent decisions in *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. 1384 (1989), and *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989). After outlining the principles recognized in those cases, the court rejected two "basic distinctions" that petitioners sought to draw between *Von Raab* and this case. First, the court found that the fact that Justice Department employees work in traditional office environments–though it is an "element to be weighed in the balance"–is not "of overriding significance." Pet. App. 11a. Second, the court determined that the fact that the program provides for random testing, while "relevant," does not require "a fundamentally different analysis from that pursued by [this Court] in *Von Raab*." *Id.* at 12a.

The court of appeals then applied the approach of *Von Raab* and *Skinner*–which balances the individual's expectation of privacy against the government's interests in a testing program–to each of the interests advanced by the government to justify drug testing under the OBD Plan. The court ruled that the government's interests in preserving the integrity of its employees and in protecting public safety do not justify random drug testing of any of the categories of employees earmarked for testing. Pet. App. 13a-16a.[3]

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plaintiffs fell within those categories and thus that petitioners and their co-plaintiffs lacked standing to challenge those aspects of the program. Pet. App. 7a-8a.

[3] The panel majority indicated that it was "quite possible" that the government's interest in the integrity of its employees would

The court concluded, however, that the government's interest in protecting "'sensitive' information" justifies random testing of employees holding top secret national security clearances. Noting that in *Von Raab* this Court held that "the Government has a compelling interest in protecting truly sensitive information," the court of appeals agreed with the government that "[w]hatever 'truly sensitive' information includes, * * * it encompasses top secret national security information" (*id.* at 17a). The court of appeals held, accordingly, that "the government's interest in protecting [top secret national security] materials outweighs the employees' privacy interest, despite the fact that the OBD testing program is somewhat more intrusive than the plan upheld in *Von Raab*." *Id.* at 18a.[4]

ARGUMENT

The court of appeals' holding that the Fourth Amendment permits random drug testing of Department of Justice employees holding top secret national secur-

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justify testing of "all DOJ employees having substantial responsibility for the prosecution of federal drug offenders," but it declined to lift the injunction covering such employees because the Department had not fashioned a drug testing program limited to them. Pet. App. 15a & n.10, 19a-26a. Judge Silberman dissented from this aspect of the court's opinion. In his view, the Fourth Amendment permits testing of employees who participate in prosecuting drug-related cases, and he would have dissolved the district court's injunction to that extent. *Id.* at 28a-37a.

[4] The court found the government's interest in protecting sensitive information insufficient, however, to justify random testing of criminal prosecutors and employees with access to grand jury secrets. Pet. App. 18a-19a.

ity clearances is faithful to the general principles outlined in *Von Raab* and *Skinner*, and does not conflict with the decisions of any other court of appeals. Contrary to petitioners' contention, the fact that the program at issue provides for *random* testing does not render it suspect. On that point, the court's conclusion is consistent with decisions from five other circuits that have upheld programs having that same feature. Petitioners' assertions that the court of appeals misapplied *Von Raab* and *Skinner* in various respects are also without merit, and, in any event, those contentions do not raise questions of general importance. Further review is therefore not warranted.

1. Petitioners' principal contention is that there are "profound" differences between programs that provide for universal testing of a category of employees and random testing programs. Pet. 6; see *id.* at 6-16. In their view, the principles of *Von Raab* and *Skinner* should not be "extended" (*id.* at 6, 8) to random testing programs. However, to date, six circuits, including the D.C. Circuit in this case and in two other cases,[5] have upheld random urinalysis drug testing programs against Fourth Amendment challenges. *Guiney* v. *Roache*, 873 F.2d 1557 (1st Cir.), cert.

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[5] *National Federation of Federal Employees* v. *Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (upholding random testing for drug counsellors and other civilian employees of Department of the Army, and striking down random testing for Army civilian employees working in drug testing laboratories), petition for cert. pending, No. 89-635; *American Federation of Government Employees* v. *Skinner*, 885 F.2d 884 (D.C. Cir. 1989) (upholding random testing of Department of Transportation employees holding safety-sensitive jobs, including aircraft mechanics and safety inspectors).

denied, No. 89-205 (Nov. 13, 1989) (Boston police officers); *Transport Workers' Union, Local 234* v. *Southeastern Pennsylvania Transportation Authority*, 884 F.2d 709 (3d Cir. 1989) (public transit employees); *Thomson* v. *Marsh*, 884 F.2d 113 (4th Cir. 1989) (Army civilian employees with access to chemical warfare material); *Taylor* v. *O'Grady*, No. 88-1783 (7th Cir. Nov. 1, 1989) (correctional officers who have regular contact with prisoners); *Rushton* v. *Nebraska Public Power District*, 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employees).

Except for *Rushton*, which was cited favorably in *Skinner*, 109 S. Ct. at 1419, each of these decisions was issued after this Court's rulings in *Von Raab* and *Skinner*. In each of them, the court of appeals, like this Court in *Von Raab* and *Skinner*, examined the balance between individual interests in privacy and governmental interests in detecting and deterring drug use in the context of the particular program at issue. While some of the decisions noted that the random aspect of a testing program is a factor to be considered in that balance, the courts have also agreed that random testing does not call for a legal standard different from that applied in this Court's cases. The court of appeals' decision in this case is representative. The court observed that the random nature of the Department of Justice testing program is a relevant consideration that could "tip the scales" in a close case. But the court also made clear that that feature of the program did not require the court "to undertake a fundamentally different analysis from that pursued by the Supreme Court in *Von Raab*." Pet. App. 12a.

As the court of appeals noted (Pet. App. 12a), the reasoning of *Von Raab* and *Skinner* does not justify

the sharp distinction that petitioners would draw between programs that provide for random testing of persons holding sensitive positions and programs that prescribe so-called "gateway" testing (Pet. 6) of all applicants for such positions. The Court's observation in a footnote in *Von Raab* that under the program at issue there "applicants know at the outset that a drug test is a requirement of" employment–mentioned as one of several factors that "minimize the intrusiveness of the [Customs] Service's drug screening program," 109 S. Ct. at 1394 n.2–does not justify a fundamentally more demanding standard for random testing programs than for those of the type that this Court considered. Indeed, if the government has a compelling interest in detecting and deterring drug use by persons holding certain sensitive positions, that interest is as compelling with respect to incumbents as it is to applicants. The court of appeals' adherence to the balancing approach that this Court recognized last Term was thus not an unwarranted "extension" of the Court's cases. Rather, as the courts of appeals have uniformly recognized, petitioners' position would unduly and artificially limit those decisions.

This Court's traffic stop cases also provide no support for petitioners' position. See Pet. 13-14 n.8. The two decisive shortcomings in the discretionary license checks that were held unconstitutional in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), are not present in the program at issue here. First, the Court noted that "every vehicle on the roads" was subject to seizure "at the unbridled discretion of law enforcement officials," and thus that there was a "'grave danger' of

abuse of discretion." 440 U.S. at 661, 662.[6] By contrast, the OBD program reserves *no* discretion to agency officials as to who will be tested.[7] Second, the discretionary license checks in *Delaware* v. *Prouse* entailed "signalling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority." 440 U.S. at 657. Here, by contrast, the OBD Plan provides for advance notice of random testing,[8] thereby mitigating any tendency of

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[6] See also *Colorado* v. *Bertine*, 479 U.S. 367, 376-377 (1987) (Blackmun, J., concurring).

[7] The OBD program is subject to guidelines issued by the Office of Personnel Management that state that "[a]gencies are absolutely prohibited from selecting positions for drug testing on the basis of a desire to test particular employees." Federal Personnel Manual Letter 792-19, 54 Fed. Reg. 47,324, 47,330 (Nov. 13, 1989). Once positions are designated for random testing, the OPM Guidelines suggest various methods of random selection: "their names or social security numbers may be selected randomly by computer, they may be selected according to their birth dates, or they may be selected by the first letter in their surnames." *Ibid.* Alternatively, the head of the agency may decide that all employees in the positions designated for testing shall be tested. *Ibid.*

Moreover, the procedures that must be followed in administering the drug tests are prescribed in detail by HHS Guidelines–an additional protection against abuse or harassment. See Pet. App. 140a-146a.

[8] Executive Order No. 12,564 requires agencies, including the Department of Justice, to give their employees 60 days notice before a drug testing program is implemented. 51 Fed. Reg. 32,889 (1986); Pet. App. 64a. In addition, employees who are subject to random testing must receive another notice, no less than 30 days before testing begins. Federal Personnel Manual Letter 792-19, Section 4.b., 54 Fed. Reg. 47,324, 47,331 (Nov.

the program to engender "concern or even fright," *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558 (1976), and employees are informed discretely that they are to be tested. This combination of advance publicity and discrete testing provides "visible evidence, reassuring to law-abiding" employees, that the random tests "are duly authorized and believed to serve the public interest." *United States* v. *Martinez-Fuerte*, 428 U.S. at 559.

Indeed, in *Delaware* v. *Prouse*, 440 U.S. at 663, the Court took care to emphasize that its decision would not prohibit States from designing "methods for spot checks * * * that do not involve the unconstrained exercise of discretion," and the Court held only that motorists could not "have their travel and privacy interfered with at the *unbridled discretion of police officers*" (emphasis added). See also *id.* at 663-664 (Blackmun, J., concurring) (noting that the result would have been quite different in a case involving "purely random stops (such as every 10th car to pass a given point)"). The OBD program does not involve "the unconstrained exercise of discretion," and is thus not suspect under the reasoning of *Delaware* v. *Prouse*, *supra*.

13, 1989).

To be sure, the particular time or date of the random test is kept a surprise, in order to deny employees who use drugs an opportunity to defeat the purpose of the tests by abstaining for a period of time. However, that degree of "surprise" is no different than that contemplated by the random checkpoint stops to which the Court referred with approval in *Delaware* v. *Prouse*, 440 U.S. at 663.

For all the above reasons, random drug testing under the OBD Plan is not fundamentally more intrusive than the applicant drug testing upheld in *Von Raab*. Even if it were, the additional intrusion would be matched by the increased effectiveness of a plan that extends to incumbents holding positions as well as applicants for those positions. See *American Federation of Government Employees* v. *Skinner*, 885 F.2d 884, 891 (D.C. Cir. 1989).

2. The court of appeals correctly applied this Court's balancing test to the category of employees at issue here. The OBD Plan's provision for testing of employees holding top secret security clearances plainly serves the government's critical interest in protecting national secrets to a degree outweighing the privacy interests of those employees. In *Von Raab*, this Court "readily agree[d] that the Government has a compelling interest in protecting truly sensitive information from those who, 'under compulsion of circumstances or for other reasons, . . . might compromise [such] information.'" 109 S. Ct. at 1396. And in other contexts, this Court has recognized that "the Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980). Accord *United States* v. *Robel*, 389 U.S. 258, 267 (1967); *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); *Totten* v. *United States*, 92 U.S. 105, 106 (1875).

The OBD plan advances that interest by making it less likely that national secrets of "the highest order of confidentiality" (Pet. App. 17a n.11) will be placed in the hands of individuals who are susceptible to breach-

es of security resulting from lapses in judgment, financial pressure, blackmail, or other problems associated with illegal drug use. See *Von Raab*, 109 S. Ct. at 1395, 1396. The government's interest in protecting highly-classified secrets is just as applicable to employees who currently possess clearances as it is to candidates for clearances who could be tested under petitioners' "gateway" theory. Even in the absence of evidence of pervasive drug use, the Department is not required to assume that its workplace is "immune from this pervasive social problem," and it may act to deter drug use as well as to detect drug users. *Id.* at 1394-1395; compare Pet. 20-23.[9]

Petitioners argue, nevertheless, that the decision in this case conflicts with the reasoning underlying the limited remand in *Von Raab*. Pet. 16-23. The court of appeals correctly rejected that assertion. See Pet. App. 17a-19a. In *Von Raab*, while the Court recognized the government's compelling interest in protecting "truly sensitive information," it remanded because the record left room for doubt as to whether the category of employees to be tested under this rubric had been

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[9] These legitimate bases for the OBD Plan lose none of their force by virtue of the fact that the Plan was adopted in response to an executive order. See Pet. 13. Executive Order No. 12,564, while requiring each agency "to test for the use of illegal drugs by employees in sensitive positions," left to the head of each agency the judgment regarding "[t]he extent to which such employees are tested and the criteria for such testing" and required consideration of "the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position." Pet. App. 63a-64a.

defined "more broadly than necessary to meet the purposes of" the Customs Service's testing program. 109 S. Ct. at 1397. Significantly, the Court did not hold that the program at issue in *Von Raab* was unconstitutional, and, in any event, the characteristics of the program at issue here permit a determination of its legality on the present record.

First, the OBD Plan is applicable only to employees who are cleared to receive "top secret" information. That category of classified information is of "the highest order of confidentiality;" it consists of "information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security." Pet. App. 17a n.11 (quoting 47 Fed. Reg. 14,874 (1982)). The court of appeals was thus fully justified in its observation that "[w]hatever 'truly sensitive' information includes, * * * it encompasses top secret national security information." Pet. App. 17a. While petitioners suggest that the court of appeals should have gone further and inquired whether employees subject to testing were likely to encounter "*Egan*-type national security information" (Pet. 19), nothing in *Von Raab* requires or permits a court to carve out a category of secrets narrower than those classified top secret whose protection justifies drug testing.

Second, whereas this Court found that the record in *Von Raab* did not foreclose the possibility that the Customs Service's program extended to employees who had little likelihood of actually obtaining access to sensitive information, regulations strictly restrict the availability of top secret security clearances and thus limit the category of employees who are subject to testing. Under the Department's regulations, a top

secret clearance is available only upon a showing that the individual has a "demonstrable need for access to classified information" (28 C.F.R. 17.95(a))–and thus presumably a reasonable likelihood of obtaining it.[10] Further, even to the extent that employees' access to information is uncertain, the court of appeals correctly noted that "[t]he whole point of granting top secret security clearances in advance is to provide flexibility, to ensure that employees can be given access to top secret materials as soon as the need arises." Pet. App. 18a.

Third, Justice Department employees entrusted with the government's most closely-held secrets have a diminished expectation of privacy with respect to inquiries into matters, such as illegal drug use, that could enhance the risk of security breaches. The grant of a top secret clearance is contingent upon a comprehensive background investigation that includes inquiries to the individual and acquaintances regarding

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[10] Under the Department's regulations, top secret security clearances are not available to persons who have a "mere possibility of access to truly sensitive information" (Pet. 18). All requests for security clearances must "contain a demonstrable need for access to classified information" and "the number of persons cleared and granted access to classified information shall be maintained at the minimum number that is consistent with operational requirements and needs." 28 C.F.R. 17.95(a). Further, the heads of Departmental divisions and offices are required to request the withdrawal of security clearances for "persons for whom there is no foreseeable need for access to classified information or material in connection with the performance of their official duties." 28 C.F.R. 17.98(d). Thus, if petitioners or others in the Department hold security clearances that are unnecessary, their proper course is to relinquish the clearances.

drug use. In *Von Raab*, 109 S. Ct. at 1397, the Court noted that background investigations are among the measures "that may be expected to diminish * * * expectations of privacy in respect of a urinalysis test." Further, as holders of security clearances know, executive officials have very broad discretion to establish and modify the criteria that determine who will be entrusted with classified information, and the expectations of privacy of those who hold top secret security clearances are correspondingly qualified.[11]

These circumstances, among others, foreclose any uncertainty of the type that led to the remand in *Von Raab*. They also fully support a conclusion that the OBD Plan is constitutional with respect to employees with top security clearances.

3. Consistent with their view that the decisions in *Skinner* and *Von Raab* "turned on limited circumstances" of those cases (Pet. 10), petitioners argue that the court of appeals paid too little heed to factual distinctions that they perceive between those cases and this one. See Pet. 18-23. However, the court of appeals correctly refused to engage in a point-by-point comparison of the facts of this case and those that this Court decided. See Pet. App. 8a-10a. Rather, it applied the "general principles" (*id.* at 8a) that this Court outlined just last Term and weighed the government's interest in protecting top secret information and the intrusiveness of the

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[11] In view of the importance of national security and the sensitivity involved in granting access to national security information, the decision whether to grant a security clearance to an Executive Branch employee–an "inherently discretionary judgment call"–has been committed to agency discretion by law. *Department of the Navy* v. *Egan*, 108 S. Ct. 818, 824 (1988).

OBD Plan within the framework this Court had prescribed. Petitioners' various assertions that the court of appeals misapplied that framework to the particular facts of this case and undervalued petitioners' concerns do not raise questions calling for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1989

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* The Solicitor General is disqualified in this case.

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No. 89-679

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

DANIEL BELL, ET AL., PETITIONERS

v.

RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

BRIEF OF PETITIONERS IN REPLY TO RESPONDENTS' OPPOSITION

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SUPREME COURT OF THE UNITED STATES

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DANIEL BELL, et al.,
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v.

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OF THE UNITED STATES, et al.,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI

Petitioners hereby offer this reply to Respondents' Brief in Opposition to the issuance of a writ of certiorari in this case.

ARGUMENT

1. The Respondents' almost cavalier dismissal of the significance of the first question presented -- whether random testing of federal employees violates the Fourth Amendment -- turns squarely on their expansive reading of this Court's decisions in National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989) ("Von Raab"), and Skinner v. Railway Labor Executives' Association, 109 S. Ct. 1402 (1989) ("Skinner"). This expansive reading, so

explicitly set forth in their Brief in Opposition, in turn presents in stark relief precisely what is at issue in this petition: Whether this Court intended and is content to allow its decisions in those two cases to serve as widely-applied support for random testing throughout the federal service.

The factual context and language of those two decisions suggest that this was not the Court's intention. Petitioners have already presented, and will not repeat, the significant factual differences between the situations presented in Skinner and Von Raab and in this case. See Petition at 10-12. However, in approving in Von Raab gateway testing of Customs agents who were directly involved in the interdiction of illegal drugs and/or who were required to carry firearms, and in similarly approving in Skinner testing of train crews involved in accidents and railroad employees who violated certain safety rules, the Court chose its language carefully so as to avoid the use of its decisions as a wholesale license to test federal employees on a random basis.

For example, the Court pointed out that a search lacking individualized suspicion may be justified only in "limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy ...." Skinner, 109 S. Ct. at 1417. The Court went on to describe the circumstances -- wholly absent here -- supporting its conclusions that the privacy expectations of the employees in those cases had

been diminished and that real problems, including significant drug abuse[1/] and drug-related bribery and threats, justified gateway (not random) testing. The Court pointed out that the promotion-based testing upheld in Von Raab entailed a diminished impact on privacy rights because "applicants know at the outset that a drug test is a requirement of those positions." 109 S. Ct. at 1394 n.2. Random testing of existing employees, of course, lacks that characteristic. The Court also noted that the employees affected in Skinner have similarly diminished privacy expectations as a result of undergoing mandatory periodic physical examinations. 109 S. Ct. at 1418. And in Von Raab, the Court expressly distinguished Customs employees subject to gateway testing from "most private citizens or government employees in general," who do not have a diminished expectation of privacy. 109 S. Ct. at 1394 (emphasis added).

Nothwithstanding the Court's clear efforts to limit the approval of testing to the circumstances of those cases, the Respondents see little if any difference "between

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[1/] The Respondents refer in their Brief in Opposition at 2 to "more than a year of study" engaged in by the Department of Justice prior to the issuance of its drug-testing plan. Apparently, that year-plus of study did not include examination, or perhaps failed to yield evidence, of drug abuse, if any, on the part of the employees to be subjected to random testing.

programs that provide for universal testing of a category of employees and random testing programs." Brief in Opposition at 6. Specifically, "the reasoning of Von Raab and Skinner does not justify the sharp distinction that petitioners would draw between programs that provide for random testing of persons holding sensitive positions and programs that prescribe so-called gateway testing ...." Brief in Opposition at 7-8.[2/] The Respondents see no need for "a fundamentally more demanding standard for random testing programs than for those of the type that this Court considered." Id. at 8. Not to extend Von Raab and Skinner

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[2/] The Respondents challenge unsuccessfully petitioners' analogy to the random highway stops held unconstitutional in Delaware v. Prouse, 440 U.S. 648 (1979), claiming that random drug testing does not involve the same type of "unsettling show of authority" present in such stops. But the Respondents minimize the obvious "unsettling show of authority" entailed when a government employee is randomly selected and told by his supervisors on two hours notice that he or she must partially disrobe and urinate into a cup while being monitored by a government observer.

The Respondents also cite Prouse to assure this Court that random "roadblock" highway stops have this Court's stamp of approval. Brief in Opposition at 10. Such approval, however, has not been given by the Court; indeed, in recognition of the serious constitutional issues involved in such random stops, the Court this term has granted certiorari in a case involving that issue. Michigan State Dept. of Police v. Sitz, 58 U.S. L.W. 3182 (U.S. Oct. 3, 1989) (No. 88-1897).

to random testing "would unduly and artificially limit those decisions." Id.

The government's intention to use Von Raab and Skinner as blanket justification for widespread random drug testing could not be more clear.[3] Assuming, as we believe and maintain, that this Court did not so intend in rendering those decisions, this case presents as fair an opportunity to address these issues as the Court is likely to have.[4]

2. Petitioners will not repeat the numerous reasons why the plan in question also fails because of its categorical approach to testing all employees with top secret clearances, without any examination of the need to test on

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[3] Indeed, the government continues to implement drug testing plans formulated before the Von Raab and Skinner decisions without regard to the issues decided therein. For instance, the Department of Labor recently issued 30 day notices to test designated employees announcing imminent implementation of random drug testing under a plan that was formulated prior to Von Raab and Skinner and remains unchanged. See Kramer v. Dole, No. 89-3375 (HHG) (D.D.C. filed Dec. 15, 1989).

[4] The government should draw no real comfort from the four court of appeals decisions on random testing issued since Von Raab and Skinner were decided. Unlike the decision below, all four are closely analogous on their facts to, and accordingly stand for no significant extension of, Von Raab and Skinner. See Guiney v. Roache, 873 F.2d 1557 (1st Cir. 1989) (random testing approved as to police officers

(Footnote continued on following page.)

a position-by-position basis. See Petition at 16-23. We simply note that the Respondents fail in their Brief in Opposition to identify any logical connection between the fact that an individual has such a clearance and the likelihood that "truly sensitive" information will be compromised by the individual's use of illegal drugs.

In Von Raab, the potential threat was much clearer: Customs agents have information that drug dealers would find valuable, and a drug-using Customs agent -- whose use of drugs might well be known to a given drug dealer -- might compromise that information if the dealer threatened to reveal his or her use or dependency. Indeed, this Court relied on the significant incidence of attempted blackmail of Customs agents in approving gateway testing of

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(Footnote continued from previous page)

carrying firearms or participating in drug interdiction), cert. denied, 110 S. Ct. 404 (1989); Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989) (random testing approved as to army employees who handle chemical weapons materials); Transport Workers' Union v. Southeastern Pennsylvania Transportation Authority, 884 F.2d 709 (3d Cir. 1989) (random testing approved as to railway operating personnel, in case remanded by Supreme Court with Skinner decision); Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989) (limited approval of random testing of correctional officials who come into regular contact with inmates, are armed, and/or have opportunities to smuggle drugs to prisoners).

Customs agents. Von Raab, 109 S. Ct. at 1392-93. Yet, notwithstanding this threat, the Court declined to authorize testing on the grounds of access to sensitive information because an adequate individualized showing had not been made. Id. at 1397.

In contrast, without any effort whatsoever to make such a showing, the Department of Justice would test anyone with a top secret clearance.[5/] In addition to the constitutional shortcomings of this categorical approach, it is difficult to understand why drug dealers would even be interested in the information to which most of the affected employees are privy. We doubt, for example, that drug dealers would find reason to bribe or blackmail the Freedom of Information Officer of the Antitrust Division.

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[5] On the issue of over-classification, the Respondents assure the Court that top secret clearances are not available to persons who have a mere possibility of access to truly sensitive information. Rather, all requests for security clearances "must 'contain a demonstrable need for access to classified information' and 'the number of persons cleared and granted access to classified information shall be maintained at the minimum number that is consistent with operational requirements and needs.' 28 C.F.R. 17.95(a)." Brief in Opposition at 14 n.10. Yet the court of appeals below apparently found otherwise, recognizing "some merit to the plaintiffs' contention that '[i]t is reasonable to expect that many individuals holding security clearances do not regularly see or have never actually seen any top secret information ....'" Harmon, 878 F.2d at 492. The court justified its categorical approach in terms

(Footnote continued on following page).

Certainly, the likelihood of such an occurrence cannot justify the substantial intrusion into his privacy rights proposed by the Department.[6/]

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contradictory to the above assurances by the Respondents, citing the need to "provide flexibility, to ensure that employees can be given access to top secret materials as soon as the need arises." Id. The court's rationale simply underlines the too-wide dragnet that the government has cast here in subjecting anyone with a top secret clearance to random testing.

[6/] If the government's fear is instead that drug users short of funds to buy drugs would sell secrets in order to obtain money for drugs, approval of random drug testing on this ground would open the door for an unlimited number of other Fourth Amendment intrusions such as the random searches of employees' homes or records to uncover evidence of gambling debts or other financial problems that might put the secrets known by the employee "at risk."

CONCLUSION

For all of the above reasons, petitioners request that this Court grant their petition for a writ of certiorari.

Respectfully Submitted,

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